THE JURIST

Volume IV OCTOBER, 1944 No. 4

ACQUIRED RIGHTS AND THE RETROACTIVITY OF LAWS

A STUDY of "acquired rights" and the retroactivity of laws has both a theoretical and a practical interest. The relationship between rights acquired under an obsolete law and their cancellation by a current retroactive law is productive of several interesting questions which, if understood properly, will bring into clear perspective the controlling force of legislative power. No one is likely to deny the legislator's basic control over all rights granted by law, but it is, at times, difficult to see the operation of this control or to explain its use.

Practical problems naturally result from this difficulty. If one has honestly and legitimately acquired a right under a now obsolete law, he should not be condemned when he wonders how this right can be taken from him. Under a right, perhaps used for years, certain possessions have accumulated. Are these possessions to be taken away? Or is merely the title to further acquisition to be removed? These are practical questions which should be answered. Their neglect must work harm in a society. The operation of law grants definite rights which presumably are permanent. While the sacrifice of such rights can be imposed, no one will deny that indiscriminate sacrifice is detrimental to the peace of a society. Such sacrifice can only result in doubt and distrust concerning the efficacy of law itself.

Nor is restricted sacrifice of acquired rights more acceptable if no explanation is given why and how such restricted sacrifice can be imposed. Various explanations have been offered by jurists and canonists to demonstrate the basic control of the legislator over all rights. These explanations attempt to indicate why sacrifice of acquired rights must at times be imposed and how this sacrifice is imposed. The explanations to be considered in this article all have their good points, but they are not all equally useful to explain the basic control of the legislator over acquired rights.

Before an analysis of these explanations is begun, it will be well to set down definitely what is clearly understood by an acquired right and what are the various items which must be considered in its relationship to a current retroactive law. Constant reference to this determination of ideas is necessary to avoid later confusion.

1) An acquired right is actual *possession*. This possession may consist of an object, of an office, of a status, or even of the right itself to possess. While the term "acquired right" is used to designate what has resulted from the operation of law, it is not usually an actual right which was obtained but rather the possession of an object or office or a status. Examples will illustrate: a contract of sale gave actual possession of an object; an appointment to a parish gave an office; an agreement gave merely the right to purchase. All these results of the operation of law can be considered acquired rights. The point to emphasize is the possession of the object, the office, the status, or the right itself to possess.

2) No right, even if honestly and legitimately acquired, can be permanently sustained contrary to the public welfare. This principle must be understood as pertaining to the legal order. Wherever a right transcends this order and enjoys some moral or theological status, reasons of public welfare are not always valid to cancel this right. A contract of marriage, for instance, has legal and theological aspects. The legal element cannot be dissociated from theology. Hence, it is impossible to consider the legal element of mutual consent

without consideration of the theological element of indissolubility. The latter element denies the solubility of the marriage contract. Hence, a retroactive law could not cancel the status already acquired by law.

Not all contracts, however, which have at least a basis in theology are similarly immune from retroactive laws. There is, for instance, no point of theology which would forbid the supreme ecclesiastical legislator from cancelling the effect of the contract entered into by religious profession.

3) The discussion of acquired rights has no place in the field of any status obtained through divine law. The status, therefore, resulting from valid ordination is entirely beyond the force of retroactive laws.

4) It is important to know exactly what rights, etc., were conceded by the now obsolete law. There are rights which constitute the entire concession or are inseparably connected with the concession, and there are rights which are separable from the concession itself. Not all these rights are considered as acquired rights.

Rights constituted by the concession itself and rights inseparably connected with the concession are proper items for consideration in the matter of retroactive laws. These rights are considered as immediately derived from the operation of law. Separable rights, however, are not so derived and are not proper items to consider in retroactive laws. To illustrate: a benefice is conferred with emoluments and right of precedence. The new law differs from the old in altering the requirements for the benefice and in rearranging the order of precedence. The beneficiary who had obtained his benefice under the old law retains his benefice but loses his right of precedence. In this example the actually acquired right was the benefice and its emoluments. These are not cancelled. A right dependent upon the possession of the benefice but separable from it was not an acquired right. Hence, this right is governed by the new law and, in the example adduced, is cancelled. It should be noted that no special clause is required in the new law to cancel this separable right. It does not fall

under the provision of canon 10.[1] The proper force of this canon would, in the example adduced, concern the concession of the benefice and the enjoyment of its emoluments.

Under the term "separable rights" must be included all rights which can be called minor in relation to the major right of the concession itself. At times, it may be difficult to determine which rights are in fact minor, since the concession and all its effects are frequently considered as one acquired right without any distinction whatever. There can be no serious quarrel with this usage of the term "acquired right" as long as there is no retroactive law to exercise its effect. Distinctions are not always welcome nor is any useful purpose served in constantly placing major and minor rights in their proper categories. With the advent, however, of a new law different from the old, the distinction between major and minor rights becomes a necessity. As mentioned in the preceding paragraph, minor or separable rights cease with the mere divergent text of the new law. Major rights do not so cease. Positive law requires a special clause in order that these rights be cancelled.

There is, of course, room to dispute whether some particular right is minor or major. There is no reason at all to claim that a right must, in cases of doubt, be demonstrably major before it can escape the force of a new divergent but not retroactive law. All rights must enjoy some stability. To say that a right is presumably minor if it cannot be demonstrated as major is to maintain that very little stability is found in the possession of rights. Obviously, such a contention weakens the trust in law which is necessary in a society. In cases of doubt, a right should be classified as a major right, for its possession was certain and its separability is uncertain. Hence, the presumption should be in favor of the retention of such a right.

5) Acquired rigths are rights which have been entirely and completely gained before the advent of a new divergent law.

[1] Leges respiciunt futura, non praeterita, nisi nominatim in eis de praeteritis caveatur.

This is extremely important. Rights are not always acquired by a single operation. When this does occur, the right is indisputably acquired. But acquired rights may also be the result of successive acts or they may be the effect of the passing of considerable time. Custom would be an example of the source of a right produced by successive acts. Prescription would produce rights after the passage of time. Both custom and prescription are valid sources of rights, but the necessary repeated acts and the necessary passage of time must all be completed before the new law takes its effect. Should the effect of the new law occur before custom or prescription is completed no right at all is acquired and the entire operation falls under the provisions of the new law.

6) When a right is cancelled by the retroactive force of a law, it must not be imagined that a valid act is now invalid. No disposition of law can change the actual fact. If the act was valid, it is not later invalid. What happens by the retroactive force of law is that legal recognition is no longer accorded a past valid act. This means that the sustaining force of law is withdrawn, so that the past valid act is no longer a legitimate title to possess or to operate. For the future the legal result naturally is practically the same as if no past valid act had existed. There is this difference, however, that fruits of a past valid act are not necessarily withdrawn. It is unlikely that these fruits would be withdrawn, since a legitimate title had existed by which they were gained. These fruits, therefore, are not the same as would be produced by a provisionally valid act later rescinded by judicial sentence.

With the above ideas mentioned, it is possible to state and to criticize the various explanations offered by jurists and canonists to explain the relationship between acquired rights and retroactive laws. Four jurists and canonists will be selected and their explanations examined. Of these explanations, d'Angelo's, will be reviewed first. The advantage of this selection lies in the fact that d'Angelo completely considers the Roman Law in regard to the retroactivity of laws. It will be extremely useful to know what rules, if any, can be found

in Roman Law to indicate why and how an acquired right can be cancelled.

The doctrine of d'Angelo is found in his treatise on Roman Law,[2] and in a separate article entitled " Il 'jus quaesitum' nel diritto canonico ".[3] While the principal purpose of this study is to assay the force of retroactive laws in Canon Law, it is of the greatest use first to read and comment on d'Angelo's study of retroactive laws in Roman Law.

Non-retroactivity of laws is asserted by d'Angelo as the general principle to be found in Roman Law.[4] Retroactivity of laws is claimed as an exceptional principle.[5] Texts for both principles are adduced by d'Angelo.[6]

The reasons for the general principle of non-retroactivity are considered objectively and subjectively by d'Angelo. He states that acquired rights are completely gained under a former law and as past facts should be left intact.[7] These reasons are advanced as objective reasons why laws should not be retroactive. As a subjective reason, d'Angelo says that trust in the juridical order must not be illusory.[8]

The reason for the exceptional principle of retroactivity is found in the exigencies of public order.[9]

After mentioning the dual principle which can be found in Roman Law, d'Angelo attempts to construct a general theory which will explain both the usually continued existence of acquired rights and also their occasional cancellation. He ad-

[2] *Jus Digestorum* (hereafter to be cited as *Jus*) (Romae, 1927), tom. I, pp. 155-164.

[3] This article is one of a series entitled *Saggi su Questioni guiridiche* (Torino, 1928), pp. 40-55.

[4] *Jus*, p. 157.

[5] *Jus*, p. 158.

[6] Non-retroactivity, e.g., 18 C. 4. 20; 29 C. 6. 23; retroactivity, e.g., Constitutions of Constantine, 3 C. 8. 34 (35) and Justinian, 27 C. 4. 32; cf. *Jus*, p. 157.

[7] The texts cited are *Nov.* 18. 5; *Nov.* 98. 1; *Nov.* 99. 1.

[8] The texts cited are, e. g., 23 C. 4. 35; 29 C. 6. 23.

[9] *Jus*, p. 158; the texts cited are, e.g., 27 C. 4. 32; *Nov.* 76.

mits that it is disputed whether acquired rights are retained by force of an earlier law or by the new law which recognizes the force of the earlier law.[10] Several theories asserting the continued force of the earlier law are denied by d'Angelo.[11] What must be maintained, says d'Angelo, is the fact that acquired rights are retained or cancelled in their relation to the new law. This is so because the only legal force existing is the new law.[12] Hence, it is the will of the legislator which determines the limit of time within which a right can be validly exercised. In this way retroactivity should not be considered as an exceptional principle but rather as the supreme principle of legislation. The exceptional element would be non-retroactivity, and this in private not in public law.[13]

It is, of course, to be expected that this statement of d'Angelo would be seen as conflicting with the dual principle he stated earlier as found in Roman Law. What d'Angelo probably means is that in theory every right acquired under an earlier law should cease with the advent of the new law because acquired rights no longer have an existing juridical title or law to support them. If acquired rights be considered as existing only as long as the law which produced them exists, they must of necessity cease when the law ceases. Not many such acquired rights do as a matter of fact cease, but this is because the legislator in issuing the new law limits its application to future acts.

The explanation which d'Angelo adopts in regard to acquired rights and the retroactivity of laws is perhaps the simplest explanation of all. Its very simplicity is likely to lead one to suppose that it does not really solve the problem. Consequently, one must be willing to accept a clear-cut ex-

[10] Jus, p. 159.

[11] *Loc. cit.*

[12] *Loc. cit.*

[13] ". . . *retroactivitas,* hoc in casu, non est concipienda quasi sit exceptio, sed potius est habendum ut principium supremum in materia legislativa, dum *non-retroactivitas,* seu irretroactivitas nihil aliud est nisi eius limes in iure privato"—*Jus,* p. 160.

planation as adequately solving the problem of acquired rights. Any notion that an explanation must be prolix in order to be acceptable must be abandoned.

According to d'Angelo, the purpose of the law determines the fate of acquired rights.[14] Hence, if the purpose of the law is to return all subjects to an equality, or to provide for public order, retroactivity existed. If such was not the purpose of the law, retroactivity did not exist.

From his explanation d'Angelo draws the following conclusions: (a) in public law retroactivity prevails: in private law non-retroactivity; (b) in either law retroactivity or non-retroactivity will merely prevail: neither is an exclusive rule.[15]

In further explanation d'Angelo shows that his opinion is in consonance with the age-old rules that "private good must yield to public welfare" or that "the good of individuals must yield to the good of the community."[16]

The explanation offered by d'Angelo provides also for the interpretation of laws. While it is admitted that a special clause can definitely determine the fate of acquired rights, this determination can also be made by an interpretative analysis of the purpose of a law. Hence, if a law is enacted regarding public order or welfare, it is not necessary that a special clause of the law cancel acquired rights. These rights would cease merely because they would be in opposition to a law of public order or welfare. Acquired rights, however, in opposition to laws of private welfare would not cease without a special clause canceling them.[17]

[14] *Jus*, p. 160. This explanation is asserted by d'Angelo as favored by Simoncelli, Pacchioni, Savigny and Ferrini. "Purpose of the law" is the writer's translation of d'Angelo's phrase "finis legis"; cf. *Jus*, p. 162. D'Angelo's own use of this phrase in Italian is "scopo della legge"; cf. *Saggi su Questioni guiridiche*, pp. 43-44. The Italian phrase is not accurately translated as "purpose of the law", but there is little doubt that this is what d'Angelo means.

[15] *Jus*, p. 162.

[16] *Loc. cit.*

[17] *Loc. cit.*

Explanation and analysis are given by d'Angelo before he constructs his definition of an acquired right. This is a very sensible arrangement. After discussing theories and proposing rules, d'Angelo could in clearer terms state his definition of an acquired right. It reads: *facultas moralis et inviolabilis ad aliquid habendum, faciendum vel omittendum adquisita a subjecto idoneo particulari, physico vel morali, ope anterioris legis vel negotio (seu facto) quodam iuridico sub eadem rite posito (seu omisso), cui nova lex non resistit vel saltem non obstat in scopo.*[18]

The definition of d'Angelo suffers from its length. There is no need to particularize the possessor of an acquired right. It is as obvious that the possessor of an acquired right can be a physical or moral person as it is clear that this subject must be clearly capable of possessing a right at all.

With the foregoing explanation of acquired rights in Roman Law digested, it is now necessary to see what d'Angelo held in regard to acquired rights in Canon Law.[19]

The principal parts of the article in which d'Angelo states his opinion of acquired rights in Canon Law can be set forth as (a) the relationship between canons 4 and 10, and (b) canonical practice in regard to acquired rights.

In his introduction to the relationship between canons 4 and 10, d'Angelo enumerates various opinions offered to explain acquired rights in Canon Law. The explanations rejected by d'Angelo are (a) the theory of the division between completely acquired rights and expected rights and (b) the theory of accomplished facts.[20] These theories are rejected for different reasons.

The theory of the division between completely acquired rights and expected rights is rejected by d'Angelo because it does not explain everything which can be considered an ac-

[18] *Jus*, p. 163.

[19] Cf. "Il 'jus quaesitum' nel diritto canonico". This article is found in *Saggi su Questioni guiridiche*, pp. 40-55. This article will hereafter be cited as "*Saggi*".

[20] *Saggi*, pp. 42-43.

quired right.[21] It must not, however, be understood that d'Angelo's rejection of this theory is casual. He says that in view of the large number of definitions of acquired rights it is difficult to draw a secure line of demarcation between the concepts of completely acquired rights and expected rights. To show that there is really no unanimity in regard to these concepts, d'Angelo cites several jurists.[22] It is true that these jurists are not directly cited in explanation of acquired rights in Canon Law, but d'Angelo justly feels free to use their doctrine in trying to arrive at a defensible position in explaining canons 4 and 10.

The rejection of the theory of accomplished facts is made by d'Angelo because it does not provide for acts begun, indeed, in the past but not entirely completed in the past. Thus too, testaments drawn up before the advent of a new law and probated under the new law are not sufficiently provided for in the theory of accomplished facts.[23]

The theory admitted by d'Angelo as sufficiently explaining acquired rights in Canon Law is the theory of the purpose of the law.[24] This theory is explained at some length,[25] but its general explanation is the same as mentioned above in regard to Roman Law.

It is clearly seen by d'Angelo that no explanation of acquired rights in Canon Law can be made without a clear understanding of canons 4 and 10. These canons make provision both for acquired rights existing at the time of the promulgation of *The Code of Canon Law* and for rights which may be acquired under a new law possibly to be itself supplemented by a later and different law.

Canon 4 [26] provides a transitory norm. Using this norm,

[21] *Saggi*, p. 42.

[22] E. g., Gabba, Coviello, Brugi, Cavaglieri.

[23] *Saggi*, p. 43.

[24] "Scopo delle legge": cf. *Saggi*, p. 43.

[25] *Saggi*, pp. 43-44.

[26] Iura aliis quaesita ... integra manent, nisi huius Codicis canonibus expresse revocentur.

d'Angelo indicates that rights acquired before the promulgation of *The Code of Canon Law* are to be preserved unless the Code itself revokes them.[27] Thus, in origin, at least, none of the acquired rights contemplated in canon 4 are the result of the operation of the new law. Yet their retention may be considered the result of the operation of the new law. By stating that these rights are to be retained under the new law, canon 4 implies that they could be abolished or cancelled. This implication can be brought to open statement where *The Code of Canon Law* does in fact abolish or cancel them. Canon 10[28] does not provide a transitory norm. The norm of canon 10 is for the laws promulgated in *The Code of Canon Law* and for subsequent laws. According to d'Angelo, this is a principle of logic and justice.[29] It is a restatement of the maxim, *lex non respicit retro.*

In his comparison between canons 4 and 10, d'Angelo says that the exception to the general provision of canon 4 is not the exception contemplated by the *nisi* clause of canon 10.[30] Rather, says d'Angelo, the exception found in canon 4 must be attributed to necessity and proper administration.[31]

Further, in discussing canon 10, d'Angelo says this canon contains a presumption of law which will apply theoretically to every law. But this presumption can be overthrown, for instance, by laws of declarative interpretation.[32] A similar presumption of law is not asserted by d'Angelo in regard to canon 4.

The canonical practice in regard to acquired rights in Canon Law occupies d'Angelo through several pages of his article.[33]

[27] *Saggi*, p. 45.

[28] Leges respiciunt futura non praeterita, nisi nominatim in eis de praeteritis caveatur.

[29] *Saggi*, p. 45.

[30] "...ma questa eccezione non in forza del medisimo can 10 (nisi)"; *loc. cit.*

[31] "...bensì per necessitá di case e per motivi di retta amministrazione"; *loc. cit.*

[32] Cf. c. 17, § 2; *Saggi*, p. 51.

[33] *Saggi*, pp. 51-55.

There is no need to repeat everything which d'Angelo considers, for this part of the present study is mostly an attempt to survey d'Angelo's explanation of acquired rights. Yet, it should be mentioned that d'Angelo divides his consideration of canonical practice in regard to acquired rights into matters concerning rescripts, vows and oaths and matters concerning administration and trials. Special attention is paid by d'Angelo to custom and prescription. It would, of course, be interesting to follow d'Angelo through his explanation of this canonical practice, but it would not serve any useful purpose in assaying his theory of acquired rights in Canon Law.

Can the explanation offered by d'Angelo be accepted? Some criticism of the length of his definition has already been made, but the following estimate is made of his entire explanation of acquired rights.

The fundamental conception which d'Angelo possesses of acquired rights must be thoroughly grasped before a satisfactory appraisal of his ideas can be made. Hence, it is necessary to bear in mind that d'Angelo bases his theory of acquired rights on the function of law. This function is considered in both Roman and Canon Law. It is fortunate that d'Angelo is competent to speak in both fields. While his ideas may not be acceptable to all jurists and canonists, his theory does deserve close and diligent study.

It appears to the writer that d'Angelo correctly asserts that acquired rights constantly depend on the existence of some law. It is obvious that this is true in regard to the origin of acquired rights. But it is not sufficient to say or to imply that the legitimate origin of acquired rights will explain their contiued legitimate existence when the law under which these rights were acquired has ceased to exist.[34] In his conception of the supremacy of law, d'Angelo correctly intimates that this supremacy can be interpreted as protecting rights which cannot any longer have their dependence on an abrogated law.

[34] Cf., however, opinion of Michiels, *Normae Generales Juris Canonici* (Lublin, 1929), I, 61.

If acquired rights, then, are conserved, their protection must come in some way from the new and current law. It will be difficult to overthrow d'Angelo's fundamental position because it is difficult to see what acceptable theoretical basis can be found for the conservation of acquired rights if the new and current law does not in some way sustain them. No right in the purely legal order is irrevocably acquired in an absolute sense. On the contrary, every right, again in the purely legal order, is acquired with a full recognition of its relationship to the public good. Whether or not acquired rights are abolished by the new law is determined by the purpose of the legislator in formulating this law. The legislator may retain all rights acquired in the past or he may abolish all of them. Or, again, he may establish a presumption according to which acquired rights will in the individual legislative enactment be sustained or abolished. Hence, d'Angelo is correct in denying any sacrosanct quality of acquired rights in the sense that they can continue to exist without any reference at all to the new and current law. It is important to keep this in mind, for the impression can exist and grow that legal rights can be sustained independently of their relationship to law.[35]

While the fundamental conception of d'Angelo is endorsed freely, it does not follow that his precise explanation of the retention of acquired rights is in every way satisfactory. The theory of d'Angelo is that the purpose of the law explains the retention or cancellation of acquired rights. This theory is not a complete answer to the questions how and why acquired rights are retained. The theory of d'Angelo could be accepted as indicating how acquired rights are retained. If d'Angelo's contention of the dependence of acquired rights on current law be accepted, the purpose of this law will show how such rights are retained. The legislator will either declare his purpose or establish a presumption of retention.

[35] It is understood, of course, that d'Angelo's explanation does not consider rights which never had any connection with law, e. g., rights which result from promises, private pacts, etc.

The theory of d'Angelo is not so readily acceptable if one seeks a reason why acquired rights are retained. This does not mean that no explanation at all is found in d'Angelo's theory. It is possible to deduce a reason why acquired rights are retained from the consideration of the purpose of a law. In formulating his law, the legislator undoubtedly considered whether or not rights acquired in the past would hamper the efficacy of his law. Since acquired rights are left intact by this law, it must be concluded that the legislator did not consider them as likely to endanger the effect desired by the new law.

A more serious objection to the theory of d'Angelo is stated by Michiels.[36] It will be remembered that d'Angelo maintained that acquired rights so depend on the new and current law that the very purpose of this law is sufficient in itself to determine whether or not acquired rights are retained. Michiels objects to transferring the complete application of this theory to positive legislative enactments because of the text of canon 10. According to d'Angelo, if the purpose of the law would require the cancellation of acquired rights, this would occur without the necessity of a special clause. According to Michiels, this cancellation cannot be maintained without a special clause.

There is no doubt that Michiels' objection is sound, if d'Angelo's theory is accepted both as a theory of law and as an interpretation of the text of canon 10. But, it is unlikely that d'Angelo meant his theory to be considered as an interpretation of canon 10 beyond showing how acquired rights are maintained. Gratitude, however, is due to Michiels for indicating that a theory can be so misunderstood that the actual text of a law will be interpreted incorrectly. Hence, if full application of d'Angelo's theory is made to the text of canon 10 with the result that the *nisi* clause may at times be unnecessary, such interpretation would undoubtedly be erron-

[36] *O. c.*, I, 59, footnote 1.

eous. Caution, therefore, must be ever-present in using philosophy to interpret positive enactments of law.[37]

The doctrine of Michiels can next be studied profitably. Michiels acknowledges the propriety of considering acquired rights under both canon 4 and canon 10. Since, however, there are points of fact to consider as well as a rule to investigate, Michiels divides his discussion of acquired rights into two parts. Under canon 4, Michiels considers the qualifications of an acquired right; [38] under canon 10, Michiels investigates the principles or rules which determine the retention or cancellation of rights actually acquired.[39] Most of the doctrine of Michiels should be reviewed in detail.

Michiels' commentary on canon 4 indicates the various stages which lead to the acquisition of a right.[40] Michiels maintains that not only must a law exist objectively but also that this law must by some juridical fact be applied. Otherwise no acquired right is possible. This juridical fact could be called *titulus iuris*. It could consist of a promise, a contract, a foundation, etc. The determination of this juridical fact is the realization of a determined object by a determined person.[41]

From this determination, it follows that acts entirely completed in the past produce rights. Completion of an act can be made instantly or it can result from successive acts or finally be realized after a definite period of time. What is important is the fact that an act must be entirely completed before the old law is abrogated. Acts which are only partially completed will not be considered acquired rights.

[37] Cf. Michiels (*o. c.*, I, 59, footnote 1): "Theoria philosophica jurium quaesitorum nullum habet valorem voluntatis legislatoris suppletivum, sed merum valorem voluntatis legislatoris *expresse manifestatae* interpretativum".

[38] *O. c.*, I, 59-70.

[39] *O. c.*, I, 192-212.

[40] *O. c.*, I, 59-60.

[41] "... a determinata persona in actum deducatur et relate ad determinatum objectum realizetur".

Further, according to Michiels, once a right is acquired it is so gained that it continues to produce its effect. It serves also as a basis for rights which are inseparably connected with the acquired right.[42] From these rights must be distinguished other rights which depend on the original acquired right but which are not inseparably united to it. Such rights, in order to be considered as acquired rights, must be gained by separate acts. Examples might be various capacities which are connected with but not inseparably united to the original and basic acquired right.

It is important to know what rights are inseparably united with the basic acquired right and what rights merely depend upon it for their legitimate exercise. Michiels considers the importance of this distinction, and he correctly states that the latter rights fall under the provisions of the new law without any special reference in *The Code of Canon Law*.[43] A clear understanding of the distinction between rights inseparably united to an acquired right will obviate much confusion and settle many points of fact.

Michiels disagrees with d'Angelo in his opinion of the use of the rule found in the *nisi* clause of canon 10 in the explanation of the exception contemplated in canon 4. It was held by d'Angelo that this *nisi* clause is not applicable in canon 4. Michiels claims that this clause is applicable.[44] Probably Michiels' contention is better sustained, for the force of the *nisi* clause is equal in both canons. There is no real reason why a different interpretation should be made. It is true that canon 4 is a transitory norm, while canon 10 is not. But it does not follow that the reason sustaining the *nisi* clause in the canons is itself different.

In his discussion of canon 10, Michiels briefly reviews the antecedent doctrine regarding retroactivity of laws in both

[42] Michiels mentions the husband's right to control the property of the family, the education of children, etc.; cf. *o. c.*, I, 62.

[43] *O. c.*, I, 63.

[44] *O. c.*, I, 69.

Roman and Canon Law.[45] Perhaps, Michiels' treatment is too brief, for his ideas cannot be adequately estimated unless sufficient indication is given of his grasp of Roman Law and of the Canon Law of the Decretals. Michiels' knowledge of the latter is not, of course, to be doubted, for in other matters he shows himself completely conversant with the pertinent legislation. It would be well if similar assurance could have been had regarding Roman Law.

Michiels introduces his discussion of the principles involved in the interpretation of canon 10 by stating what is meant by *agere* and *retroagere*.[46] There is nothing startling in these explanations, but it is useful to find them so clearly enunciated. *Agere,* according to Michiels, means to produce an effect; *retro agere* means to produce this same effect on an act entirely completed in the past. There is nothing new in these explanations, but they do serve the purpose of setting forth concepts clearly.

The analysis of Michiels of canon 10 results in the statement of two principles; a general principle and an exceptional principle.[47] This is, however, a practical analysis which does not pretend to find any primary support in philosophy for this division. The viewpoint of Michiels in thus analyzing canon 10 is almost entirely a practical thing. He reserves his formal consideration of the philosophy sustaining canon 10 for a later treatment.

Michiels, however, does not entirely omit consideration of the purpose of law in fixing his principles. Some attention must, of course, be paid to the reasons why a law should exist and how it can operate. Thus, in his explanation of the general principle of canon 10, viz., laws concern the future not the past, Michiels says that of its nature a law places a norm

[45] *O. c.*, I, 194-195.

[46] *O. c.*, I, 193.

[47] *O. c.*, I, 195-198, *principium generale;* pp. 198-210, *principium exceptionale.* These principles could better be called rules.

or rule of action.[48] Past acts are thus beyond the scope of a new law because these acts were completed before the new law was promulgated. This sounds reasonable enough if the origin of the rights produced by these acts is alone considered. It is not, however, so readily accepted if, as Michiels maintains,[49] the effects of past acts are acquired rights. It is, therefore, somewhat inconsistent to maintain that a past act is beyond the control of a law and yet to admit its possible cancellation by the provision of this same new law. Such cancellation is admitted by Michiels in his exceptional principle.[50] There Michiels says that the public good can demand the cancellation of acquired rights.

If, however, it be kept in mind that Michiels in interpreting canon 10 is merely saying when a practical norm is to be applied to acquired rights, no real difficulty can be found in his doctrine. Thus, omitting all consideration of the reasons why the legislator so fixed his law and restricting oneself to the application of the law of canon 10, it is easily seen that the principles Michiels proposes are in thorough consonance with the text of canon 10. Hence, by general principle, a law is not retroactive; by exceptional, it may be. The further conclusion, therefore, is that retroactivity must be proven. It can never be assumed. It is precisely here that Michiels' doctrine is preferable to the opinion of d'Angelo. The latter by implication, at least, would admit retroactivity without a special clause. This is correctly and properly denied by Michiels. This was referred to above in the consideration of the opinion of d'Angelo, but it can well be stated again that philosophy of law does not fill the absence of a special clause when this clause is demanded by positive law.

Michiels closes his study of canon 10 with a brief review of the opinions offered to explain retroactivity and non-retroactivity of laws. Michiels does not offer any clear-cut and

[48] *O. c.*, I, 197.

[49] *O. c.*, I, 61.

[50] *O. c.*, I, 200.

detailed opinion of his own. He considers all the opinions [51] and, in a sense, rejects all of them. The reason he advances is that no opinion thus far advanced entirely and completely solves the problem. He willingly concedes partial validity to their opinions, but he confesses an inability to accept any one as completely satisfactory. None the less, it must be said in point of fact that Michiels ultimately must explain the practical principle he offers by agreement with the opinion held by d'Angelo. Michiels says that if the purpose of the law cannot be obtained without retroactivity, such retroactivity, whole or partial, must be admitted.[52] This is what d'Angelo holds.

What can be said of the doctrine of Michiels? Beyond doubt the commentary of Michiels on canons 4 and 10 is necessary for any student of Canon Law. There is clarity of propositions which is not found in d'Angelo, and there are abundant examples illustrating the doctrine proposed. These items cannot fail to produce a better understanding of acquired rights.

Further, since Michiels did not intend to do much more than to offer a commentary on canons 4 and 10, it would be unfair to speak of his neglect of suitable theoretical discussion. What discussion there is can, however, be subject to some criticism.

Michiels maintains that acquired rights depend on neither the old nor the new law. This is an impossible position. By his own admission, Michiels sees that acquired rights continue to produce their effects. By what law are they protected? Are these rights exercised without reference to law? It can scarcely be admitted that a legal right can exist without some relationship to existing law. By denying dependence on both the old and the new law, Michiels implies the absolute sanctity and the absolute independence of acquired rights. Such a position is entirely contrary to the notion of a society. Too

[51] *O. c.*, I, 211.

[52] *O. c.*, I, 212.

much stricture, however, should not be laid upon Michiels. He openly admits the possibility of the cancellation of acquired rights. Hence, he must likewise admit that these rights are under the control of the new law to be retained or abolished as the will of the legislator indicates. The will of the legislator is, as Michiels maintains, the controlling factor.

Van Hove has a considerable treatise on acquired rights and the retroactivity of laws.[53] In his customary way, Van Hove deals with most of the points which can be discussed in this field. A statement of his position and an analysis of his opinion follow.

Van Hove begins his consideration of acquired rights with an ample disquisition on their treatment in Roman Law.[54] He follows this with a detailed review of acquired rights in the successive epochs of Canon Law.[55] After this introduction, Van Hove considers various modern theories which are suggested in Civil Law to explain the retention or the cancellation of acquired rights.[56] It is in this section that Van Hove states the contention of d'Angelo that acquired rights are retained or abolished according to the purpose of the law. The opinions of canonists after the promulgation of *The Code of Canon Law* next occupy Van Hove's attention.[57] There is sufficient discussion of these opinions. Van Hove draws the general conclusion that none of these opinions adequately solves the question of possible retroactivity of laws. Van Hove's own solution is that an acquired right presupposes a juridical fact,[58] and that this juridical fact should be stressed rather than the rights produced by this fact. Van Hove says this is more in consonance with Roman and Canon Law. It is better, he claims, to indicate the cause of the right than to

[53] *De Legibus Ecclesiasticis* (Mechliniae-Romae, 1930), pp. 18-51.

[54] *O. c.*, pp. 20-21.

[55] *O. c.*, pp. 21-26.

[56] *O. c.*, pp. 26-30.

[57] *O. c.*, pp. 30-37.

[58] *O. c.*, p. 35.

state the effect of this cause. Van Hove finds other difficulties in the use of the term "acquired rights". For instance, an act invalidly placed in the past impedes rather than produces rights; again, certain penal laws are retroactive although no acquired right is involved.[59] Finally, Van Hove intimates that "acquired rights" is too general a term.[60] All rights, he says, which are not natural are acquired rights. Therefore, there is not a clear distinction between rights acquired before the promulgation of *The Code of Canon Law* and rights acquired since this promulgation.

Van Hove does not entirely neglect the philosophy of law. He maintains that laws are of their nature non-retroactive,[61] or at least non-retroactivity is founded on the nature of law. Van Hove apparently considers canon 10 as a rule of interpretation and as a restriction on the legislative powers of Superiors lower than the Roman Pontiff. Such restriction, however, could have been presumed as known by all legislators.

In union with all canonists, Van Hove clearly claims that the legislator can enact retroactive laws. Such action, however, cannot be arbitrary, and only reasons of public good suffice.[62]

Before an analysis of Van Hove's ideas is attempted, it should be stated that Van Hove gives a creditable account of the operation of laws as affecting penalties, customs and prescriptions.[63]

Van Hove does not contribute very much to a better philosophical grasp of the relationship between acquired rights and the operation of newly promulgated laws. Much, however, of what Van Hove says is interesting. His detailed account of the actual retroactivity of some laws is a close study and is

[59] *O. c.*, p. 36.

[60] *Loc. cit.*

[61] *O. c.*, pp. 37-38.

[62] *O. c.*, p. 37.

[63] *O. c.*, pp. 38-47.

worthy of his reputation. The opinions of Van Hove are never to be neglected, but it must be said that he gives no better philosophical explanation of acquired rights than other authors. Nevertheless, several points should be examined.

Van Hove says that the juridical fact should be stressed rather than the right produced by this fact. This idea can be readily accepted, for a juridical fact is better understood in relationship to law than would be a right acquired by the existence of this fact. It is easy enough to speak of rights as granted by the operation of law, but it is not always remembered that rights are not usually directly conceded without the intervention of some juridical fact. While it may not be necessary to point out each time that a juridical fact supports a right, it is extremely useful to keep this idea in mind when dealing with the possible retroactivity of laws. Van Hove, then, is to be commended for stating clearly and without equivocation that the juridical fact is to be stressed rather than the acquired right.

Van Hove's contention that acquired rights will not completely explain the non-retroactivity of most laws must be admitted. Retroactivity does exist where acquired rights are not concerned.[64] At the same time, non-retroactivity is found in the general law. There is no real relationship of cause and effect founded on the existence of acquired rights. In other words, the legislator is in no way forced to recognize the security of acquired rights. If, in penal laws, the legislator can order retroactivity, he enjoys similar power in other laws. The most that can be said for the influence of an acquired right on the formation of a new law is that its existence should not be lightly set aside. Acquired rights, as Van Hove intimates, are not immune from the power of legislation.

Van Hove's use of the maxim "*lex non respicit retro*" is open to criticism. Van Hove states that even if *The Code of Canon Law* made no stipulation laws would not be retroac-

[64] E. g., penal laws; cf. c. 2226, § 2.

tive.[65] This is, indeed, a restatement of the common opinion in regard to the function of law. But Van Hove should have indicated that this maxim is not really a principle but the expression of a well-founded presumption. Van Hove does not deny the legislator the right to enact retroactive laws. In fact, he openly concedes this right and says that no canonist will deny it.[66] If this right is universally admitted, it is difficult to see that its use is contrary to a principle of law. At any rate, an indication should be given by Van Hove that an exceptional use of power is had rather than to say that non-retroactivity is founded on the nature of laws.

Since Van Hove speaks of the nature of laws, a word may be said of the maxim itself.

The maxim "*lex non respicit retro*" is primarily concerned with the primary effect of a law. This is the obligation to obey a law. Obviously such obligation cannot exist in regard to a past, completed act. To punish, for instance, because of a past act when no law forbade this act is certainly contrary to natural law. Where no law existed, no obligation can exist. This is obvious to all. But laws have other effects which are not primary. The maxim does not essentially touch these effects. If the maxim has any validity, it is due to the restraint which the legislator himself exercises. Since all rights essentially depend on the law for conservation and protection, it is this law which will say whether rights are to be conserved and protected or to be cancelled and abolished. There is every good reason why in course of time past completed acts should be left intact. Thus, an adaptation of the maxim could be made to these acts. Such adaptation, however, is no more than first the presumptive and later the disclosed will of the legislator. In no sense at all is the maxim more than a strong presumption in regard to the secondary effects of a law.

Van Hove is critical of the term "acquired rights" to de-

[65] "Ex natura sua leges non retrahuntur, adeo ut, etiam silente lege vel Codice, non retrotractio sit admittenda, utpote fundata in natura rerum"; — *o. c.*, p. 37.

[66] Cf. *o. c.*, p. 37.

note past completed acts.[67] He intimates that this term is equally applicable to any right the acquisition of which is not immediately determined by natural law. Some further distinction, therefore, should be made. It is easy to see that Van Hove's criticism, while valid in itself, is not necessarily to be accepted. While the term "acquired rights" can, of course, be predicated of any right which is gained and not determined by natural law, none the less there is a technical meaning attached to this term which, if understood, will eliminate confusion. It is not to be feared that anyone speaking of acquired rights in regard to the possible retroactivity of laws will understand any right but one gained in the past through the operation of a now non-existent law. Even Vermeersch's explanation of acquired rights does not beget fear of real confusion of terms.

The last opinion to be stated and examined is offered by Vermeersch.[68]

Vermeersch does not differ from others in conceding the right of the legislator to enact retroactive laws. Such force, however, is beyond the natural force of law.[69] The various opinions which are offered to explain retroactivity and non-retroactivity are stated by Vermeersch. His own explanation differs considerably from other opinions.

Vermeersch says that all acquired rights fall into two classes. The first class contains rights which belong to one's possessions.[70] These rights have been completely acquired in the past and are not affected by retroactivity. The second class contains rights which are enjoyed in virtue of the immediate and permanent possession of some thing.[71] This immediate

[67] *O. c.*, p. 36.

[68] *Epitome Iuris Canonici* I (ed. quinta, Mechliniae-Romae, 1933), 90-95.

[69] "Lex . . . quae in praeteritos actus exserat suam vim ultra conaturalem suam virtutem, dicitur ad praeterita retrotrahi, esse retroactiva";—*o. c.*, I, 90.

[70] "Alia [bona] possidentur *in se*"; *o. c.*, I, 92.

[71] "Alia autem bona possidentur *in virtute causae immediatae possessae et permanentis*";—*loc. cit.*

thing (*causa*), possessed and permanent, is called a title. If this title is a law, rights derived from it cease when the law is changed. If, on the other hand, this title is independent of law, rights dependent upon it continue to exist.

Before attempting an analysis of this opinion, two items should be mentioned.

Vermeersch offers a suitable set of examples to show how retroactivity operates.[72] He also says that official decisions will vary regarding the retention or the cancellation of acquired rights because different systems will produce different results.[73] This is a practical statement. One should remember that whatever opinion is personally adopted it may not be the opinion of whoever is called upon officially to solve a problem. Hence, there may be inconsistencies in the responses received from the Holy See. As Vermeersch says, for the good reasons the Holy See can extend or restrict the law as constituted.[74]

Vermeersch should be commended for his brief but succinct exposition. In a few pages, Vermeersch succeeds among other things in reviewing the opinions of canonists, in setting forth a set of examples and in asserting his own views in regard to acquired rights.

Vermeersch's explanation of acquired rights is simplicity itself. But this very simplicity is really deceptive. It seems very easy to classify all acquired rights into two groups and thus compare them with the new and current law. If all rights thus classified could actually be compared with the new law, Vermeersch's explanation would be readily acceptable. This, however, is not possible.

The contribution of Vermeersch is the assertion of a possible title producing rights independently of law. Everything else in the explanation of Vermeersch can be, at least, deduct-

[72] *O. c.*, I, 94-95.

[73] *O. c.*, I, 94.

[74] *Loc. cit.*

ively, found in other theories. What is common to all theories need not be again discussed, but some effort should be made to see whether the title spoken of by Vermeersch can be admitted.

By a title independent of law, Vermeersch understands something not controlled by law. Rights dependent upon this title are acquired rights. But are these acquired rights in the sense of canons 4 and 10? It must be remembered that Vermeersch is not speaking of any private agreement or promise which has the protection of law, such as contracts of sale, purchases, etc. The rights referred to by Vermeersch are entirely outside the protection of law; e. g., a promise of a donation, or an entirely private pact, etc. If one is thwarted in the gaining of these rights or is deceived by non-legal promises, he has no remedy at law. The entire acquisition of such rights rests upon fidelity.

It is clear enough what Vermeersch means by rights proproduced by a title independent of law, but it is by no means clear how Vermeersch can include these rights as even theoretically connected with a discussion of acquired rights and the retroactivity of laws. The term " acquired rights " is a technical term. It has no meaning at all except in its relationship with law. To broaden this meaning so that all rights no matter how acquired are included in the extension of this technical term produces erroneous impressions. There is no doubt at all that rights obtained outside the law are preserved. But there was and is no question about this. Throughout this article it has been maintained that the question of retention or cancellation of acquired rights depended upon their relationship to law. If this relationship is impossible no such question can be discussed. Hence, Vermeersch's contention that rights acquired without the operation of law are not subject to retroactivity is meaningless. If these rights do not depend on the law, the law cannot touch them. Whatever exception Vermeersch may be willing to make for the sake of public good does not really touch retroactivity. If these rights

are abolished for reasons of public good, it is an exercise of eminent domain, quite a different thing from retroactivity.

Attention should also be called to the difficulty Vermeersch experiences in understanding the response of the Pontifical Commission for the Interpretation of the Code of Canon Law of November 24, 1920.[75] This response included religious secularized before the promulgation of the Code within the prescriptions of canon 642. This canon forbids secularized religious from obtaining some benefices and teaching and curial offices without an additional indult. Vermeersch feels that some retroactive force is found in the response of the Pontifical Commission.[76]

Despite Vermeersch's view, it must be maintained no retroactive force is found either in the law of canon 642 nor in the response of the Pontifical Commission. It is true that formerly a secularized religious could obtain a benefice. If this benefice was actually obtained, it is not taken away from him by canon 642. If, however, no benefice was obtained, the capacity to acquire a benefice is now abolished. This does not affect the actual status of the secularized religious. It does, of course, reduce his capacity to acquire rights. But in no instance is the secularized religious deprived of any right actually acquired.[77]

The preceding analyses revealed points which can be profitably considered as well as items which should be rejected. It is scarcely possible to give a final word regarding acquired rights because both theory and practice will enter into any explanation which might be made. Where theory is empha-

[75] *AAS*, XII (1920), 575.

[76] *O. c.*, I, 95.

[77] An example of retroactivity offered by Vermeersch is found in canon 1017, § 3. There no right to marriage is acknowledged although other effects of betrothals are to be decided by the law in force when these betrothals occurred. Any acquired right, then, which existed under the old law remains except the right to marriage. In regard to this one effect canon 1017, § 3 may be considered retroactive, although what is abolished is more of an expected right than an acquired right.

sized, the practical requirements of law are apt to be forgotten. Where practice is stressed, reasons for this practice are not always sufficiently considered. Yet the juxtaposition of theory and practice must be indicated, and it must be indicated in a way that is both logical and legal. The following ideas, then, may be of assistance in determining the relationship between acquired rights and the provisions of the new and current law.

1) The first thing to determine is whether an explanation is desired of the actual fact of retroactivity or an explanation how and why some laws are retroactive. If, on the one hand, the former explanation is desired, the answer is simple. The will of the legislator determines entirely and completely whether a law is retroactive or not. This practical answer is sufficient for the essential commentary on the force of canons 4 and 10. If the law does not definitely and clearly state that it is retroactive, such force cannot be attributed to it. Presumptive retroactivity, as d'Angelo suggests but Michiels denies, cannot be admitted. If, on the other hand, a philosophical explanation of retroactivity is desired, the answer is anything but simple. Whatever answer is given depends on the power of the legislator and the nature of the instrument used to produce retroactivity. All canonists will concede the power of the legislator to enact retroactive laws, but no unanimity is found on the nature of the instrument used by the legislator to produce this effect. If one agrees with d'Angelo that laws are primarily retroactive and secondarily non-retroactive, he must conclude that in theory retroactivity is a quality of law. This quality can, of course, be destroyed by the contrary presumption established by the legislator. If, however, one agrees with the usual opinion mentioned by both Van Hove and Vermeersch that non-retroactivity is at least founded on the nature of laws, he must conclude that retroactivity can only be an exceptional use of legislative power. The latter opinion obviously better explains the text of canons 4 and 10, but as was stated earlier the maxim "*lex non respicit*

retro" is not a principle but a presumption in regard to the secondary effects of a law.

2) The next point to consider is that no right acquired in the legal order can stand contrary to the public good. There is no need to expatiate on this point.

3) After determining in which field an explanation is desired in regard to acquired rights and after stating that all rights are under the legal control of the legislator, one can begin to point out the stages which will lead to the retroactivity or the non-retroactivity of the new law.

Before formulating his new law, the legislator is faced with a dilemma. He has before him both the trust which his subjects place in the retention of their rights and his responsibility to provide for the public good. This is a serious dilemma. Shall the legislator protect the acquired rights of his subjects or must they be sacrificed for the public good? While the legislator knows that no right is ever acquired irrevocably in the purely legal order and knows, too, that his subjects are aware of this, he cannot lightly set these rights aside, for the trust of the people in their rights is deep-rooted and legitimate. At the same time, the legislator knows that his responsibility for the public good is his first and essential obligation. The dilemma is solved in this way: there is no time at all when the obligation to provide for the public good is in abeyance; there is a time when the acquired rights of subjects can be cancelled. Should this time be present, the legislator determines that his law shall be retroactive.

4) The decision of the legislator to make his law retroactive can only be made after considering the purpose of this law. It seems that d'Angelo is correct in assigning this as the reason to be adduced for the retroactivity of some laws. Unless the purpose of a law determines its extension, this extension itself can never be adequately construed. The difficulty, however, with this explanation is that the purpose of a law is infrequently stated in its text. There are comparatively

few examples of such statement in *The Code of Canon Law*.[78] The determination of the purpose of a law is mostly arrived at by canonical jurisprudence. Such determination is scarcely sufficient to abolish acquired rights. Nevertheless, the purpose of a law should be admitted as the essentially controlling factor in the mind of the legislator before he actually formulates his law. Whether or not this purpose is later revealed in the text of the law itself or is deduced from this text by canonical jurisprudence is immaterial as far as the legislator's own preparatory determination is concerned. Hence, with d'Angelo it is here maintained that the purpose of a law is the explanation why acquired rights are at times cancelled.

5) Once the legislator has determined that acquired rights should be cancelled, he must, to give expression to this determination, specify this effect of his law definitely and clearly. The text of a law is the only immediate and proper source in which to find a specific retroactive clause. If this clause is lacking, interpretation must proceed along the lines of non-retroactivity. This is extremely important for all practical commentary on canons 4 and 10. Whatever may be said of the reasons why a law exists, no retroactive force can be predicated of a law unless this force is specifically found in the text of the law. The words "*expresse*" in canon 4[79] and "*nominatim*" in canon 10[80] exclude any retroactivity which may be merely deducible from the law. Hence, simple opposition between the acquired rights and the text of the laws of the Code is not sufficient to cancel these rights. There is no need to expatiate on the periodical desirability of including all under the common law. This has already been considered by the legislator, who in omitting to place a specific retroactive clause in his law has determined that such inclusion is at least inopportune.

[78] E. g., cc. 290; 343, § 1.

[79] ... *nisi huius Codicis canonibus expresse revocentur.*

[80] ... *nisi nominatim in eis de praeteritis caveatur.*

The preceding paragraphs have attempted to show how some laws are retroactive and others are not. Both theory and practice have been considered. An effort has been made to see where and when emphasis can be made either on theory or on practice. It is hoped that some clarification of the question of acquired rights and the retroactivity of laws has been made.[81]

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[81] Extensive bibliographical notices have been avoided in this article. Ample bibliographical matter can be found in Van Hove, *o. c.*, p. 18 and in the footnotes to the pages cited in the article. Michiels uses much the same bibliography. Vermeersch and especially d'Angelo give sufficient notice to authors who have written on acquired rights in Roman, Civil and Canon Law. Much of the bibliography found in these authors would have been superfluous in the discussion made in the text of the above article.

An adequate discussion of the possible retroactivity of laws can be found in Suarez, *De Legibus ac Deo Legislatore,* lib. III, cap. XIV. Commentaries on X, *de constitutionibus,* I, 2 may also be profitably consulted.

THE CANON LAW OF WILLS *

THE privilege of reviewing certain principles of the canon law of wills before this distinguished group of scholars, learned in the Anglo-American law of wills, is one that can not be overesteemed. Comparative discussions in cognate sciences have always been rich in the promotion of mutual understanding between those proficient in the respective fields. Therefore, the cultural possibilities of a discussion such as this should not be unattractive to those skilled in Anglo-American law even though the profit might conceivably be greater if this paper were entrusted to more capable hands than mine. Moreover, the antecedents of the Anglo-American law of wills being almost completely canonical, a presentation of canonical traditions in this matter holds a promising prospect of the revelation of historical explanations of testamentary institutes in not only the present canonical system but the Anglo-American system as well.

The matters with which this paper should deal fall without too great pressure into three wide categories, and it is according to these categories that an attempt will be made to present them rather clearly if briefly. Commencing with the administration of a will, one notes that the logical problem to be solved in any system is the governmental personnel charged with its supervision, in other words, the court of jurisdiction. Then, assuming that jurisdiction is properly allocated, the next question naturally arises as to the character of the will itself, that is, as to the formalities requisite that it may be considered an authentic and genuine testamentary disposition. Finally, assuming the proof of authenticity and genuineness adequately provided for, one is prompted at length to consider the power of the testator, that is, his capacity to make a testa-

* Lecture delivered December 8, 1943, in the Cathedral Hall, Camden, N. J., and February 18, 1944, at The Catholic University of America.

mentary disposition. Jurisdiction, formalities, capacity; it is under these subdivisions that the legal principles of the canonical system will be presented herewith, while at appropriate intervals references will be interspersed to the corresponding provisions in the Anglo-American law, and even to antecedents in the Roman and Germanic systems.

I. Jurisdiction

The problem, then, which has been accorded first place in the treatment of the subject of this paper is that of jurisdiction. A fundamental premise in the canon law of wills is the position which the Ordinary holds as executor of bequests to pious causes. Throughout the whole history of the Church his prerogative in this respect has been vindicated. A pious cause in the language of the canonist corresponds roughly with the notion of a charitable cause in the language of the secular law. Precisely a bequest to a pious cause may be described as a donation made for the good of the soul of the testator, for the honor and glory of God, to adore Him, to render Him gratitude, to obtain the remission of sin or of the punishment due to it, to obtain an increase of grace or eternal reward due to holiness. A gift to a church, a monastery, or a religious institute for its maintenance or for the support of the poor is consequently a gift to a pious cause. So also would be a donation for the manumission of a slave, the ransom of a captive, the conversion of the infidel, the granting of dowries to poor girls, and the endowment of orphan asylums and trade schools. In order to be a gift to a pious cause it must be given to an institute at least approved by the Church, even though not canonically chartered. But a gift out of merely humanitarian motives is not a gift to a pious cause unless given to an institute canonically chartered. For this reason, mere philanthropy extended to the Society of St. Vincent de Paul would not be a gift to a pious cause, because this Society, though approved by the Church, is not canonically chartered. Obvi-

ously, a gift to secular hospitals, to the Red Cross, to a civic welfare fund, would not be a gift to a pious cause.[1]

Over pious gifts the Ordinary has traditionally had jurisdiction, especially when they took the form of bequests under a will. From the infancy of the Church, as he was the recipient of the liberal donations of the wealthy, so he was charged by the canons with the burden of exercising paternal care of the unfortunate.[2] This canonical attitude was given considerable impetus when imperial Roman law recognized the bishop as the administrator of all funds devoted to charity or religion.[3] Later, the imperial law, exceeding its competence in this matter, it is true, imposed on the bishop the duty of vigilance, granting him at the same time a secular action to enforce the fulfillment of charitable foundations of almost every kind.[4] Under this imperial guarantee, he was the administrator *par excellence* of these bequests, though he was expected to respect the administrators appointed by the testator; but he could remove them if they proved incompetent. And when no administrator was appointed, he was authorized to appoint them. The similarity of the office of the bishop under these imperial

[1] Cf. S.C.C. *in Causa Corrienten.*, 13 nov. 1920—*Acta Apostolicae Sedis* (*AAS*), XIII (1921), 135; *Periodica de Re Morali Canonica Liturgica* (*Periodica*), X (1921), 293; *Nouvelle Revue Théologique*, XLVIII (1921), 317; Schmalzgrueber, *Ius Ecclesiasticum Universum* (cited Schmalzgrueber), III, III, 26, 42; Reiffenstuel, *Ius Canonicum Universum* (cited Reiffenstuel), III, 25, 65; Pirhing, *Jus Canonicum Novo Methodo Explicatum* (cited Pirhing), III, 26, 19; Soglia, *Institutiones Iuris Privati* (cited Soglia), II, 4, 122; Panormitanus, *Commentaria in Libros Decretalium*, VI, 11, 7; Vermeersch-Creusen, *Epitome Iuris Canonici*, II (5th ed., Mechliniae: H. Dessain, 1936), n. 834; Vermeersch, *Theologiae Moralis Principia, Responsa, Consilia* (cited *Theologia Moralis*), 2nd ed., 3 vols., Brugis: Charles Beyaert, 1926-1927), II, n. 564; De Meester, *Juris Canonici et Juris Canonico-Civilis Compendium* (3 vols. in 4, Brugis, 1921-1928), n. 1464; Vromant, *Ius Missionariorum*. Vol. VI, *De Bonis Temporalibus Ecclesiae* (cited *De Temporalibus*) (Louvain, 1927), n. 146.

[2] Cf. Hannan, "The Bishop and Social Work"—*American Ecclesiastical Review* (cited *AER*), LXXXVII (1932), 561; Hannan, *The Canon Law of Wills* (cited *Wills*) (Philadelphia: The Dolphin Press, 1935), n. 703.

[3] C. 1, 2, 13 and 14; 1, 3, 41, 3 and 5; 1, 3, 41, 11 and 16; 1, 3, 28, 1 and 2; 1, 3, 48; *Nov.* 131, 11, 1 and 2; 131, 13.

[4] C. 1, 2, 15 (477); C. 1, 3, 45; *Nov.* 131, 7; 131, 10; 131, 11, 3 and 4; 131, 12.

constitutions to the position of the probate court is too obvious to need elaboration.

This position of the bishop was probably definitely established by the energetic, far-visioned, statesmanlike policy of Pope Gregory the Great,[5] and his authority was maintained in the decrees of the provincial councils held in the countries subject to the newly converted Germanic tribes. The wills of this period were formless in the main.[6] Under the primitive German law, only he who had no heir could create one.[7] This creation was accomplished by the herital contract, though the appointment was probably reserved originally to the tribal council. In this respect the beginnings of the Germanic will were not unlike those of Roman wills or testaments, which were made with the approval of the parliament of patricians.[8] The theory was that only when the testator had no heir could he appoint one, and then only with the consent of his peers, who conceivably might have some right of succession.

But as the plebeian will by *aes et libram,* and later the pretorian will, which dispensed with the formalities of the *aes et libram,* supplanted the patrician will among the Romans, so did the herital contract take the place of the appointment of an heir by the tribal council among the Germanic tribes.[9] The theory under these later developments among both the Romans and the Germans was that the universal succession was being sold; that is, that the family was being sold, with all its assets and liabilities.[10] The buyer could be charged with

[5] C. 1-4, X, *de testamentis et ultimis voluntatibus*, III, 26.

[6] Pollock and Maitland, *History of English Law Before the Time of Edward I* (cited *History*) (2 vols., Cambridge, 1895), II, 321, 322; Huebner, *A History of German Private Law* (cited *History*) (translated by F. S. Philbrick, Continental Legal History Series, Vol. IV, Boston, 1918), p. 755.

[7] Huebner, *History*, pp. 740, 750.

[8] XII Tables, 5, 4, 5; Gaius, 3, 1-9 and 3, 17; Ulpian, *Reg.*, 26, 1-5; I. 3, 1-8; Sherman, *Roman Law in the Modern World* (cited *Roman Law*) (2nd ed., 3 vols., New York: Baker, Voorhis and Co., 1924), II, 671; Maine, *Ancient Law* (3rd ed., New York, 1875), p. 193.

[9] Cf. Sherman, *Roman Law*, II, 683, 685, 696; Huebner, *History*, p. 742.

[10] XII Tables, 5, 3; I. 2, 22; Sherman, *Roman Law*, II, 685, 696; Maine, *Ancient Law*, pp. 172-174, 177, 178; Huebner, *History*, p. 754; Pollock and Maitland, *History*, II, 316-318.

legacies under the Roman system, and eventually the legacies became so numerous that they constituted the will, the buyer of the family still being called the heir, but being in fact little more than an executor.[11] The original Roman plebeian will was made by the striking of a scales with a copper coin, signifying the buying of the inheritance; this was done by the buyer in the presence of the seller (the testator), the holder of the scales, and five witnesses.[12] For foreigners, the pretor simplified this method by requiring the seals of seven witnesses.[13] The testament adopted by Justinian was the pretorian testament, and was a written will, shown to seven witnesses, signed at the end by the testator in the presence of the witnesses, who then affixed their signatures and seals.[14]

But the Germanic will was developed under the influence of the canonists and was notably less formal. Indeed, it is questionable whether it was a will at all, appearing rather to be a *donatio mortis causa*, neither revocable nor ambulatory. The herital contract to which reference has been made was completed through an intermediary, a trustee if you will, called a *salman*, who in the presence of the tribal court, took a reed or a spear, or later a document, which he was to deliver to the one appointed heir, at first within a year, and then later only at the death of the testator or donor. At first, too, this herital contract was permissible only when the testator had no heirs.[15] By degrees, it was made applicable also to certain portions of the non-allodial (personal) property, even when he had heirs. This concession grew out of the theory that the testator had the right to dispose of the dead man's portion.

[11] Sherman, *Roman Law*, II, 685; Maine, *Ancient Law*, p. 201.

[12] Gaius, 2, 102-104, 119; I. 2, 10, 1; Maine, *Ancient Law*, pp. 197-200.

[13] Gaius, 2, 119, 120; I. 2, 10, 2; Ulpian, *Reg.*, 28, 6; Sherman, *Roman Law*, II, 686; Maine, *Ancient Law*, pp. 202-204.

[14] I. 2, 10, 3-5; D. 28, 1, 20, 8; D. 28, 1, 22, 3-4; D. 28, 1, 24; C. 6, 23, 12; C. 6, 23, 21; Sherman, *Roman Law*, II, 687.

[15] Huebner, *History*, pp. 740-742, 750, 754; Brissaud, *History of French Private Law* (cited *History*) (translated by R. Howell, Continental Legal History Series, Vol. III, Boston, 1912), pp. 685-689, 692.

This portion in pagan days was the share of the property that was buried with the corpse or burnt with it as part of the funeral rites. Under the new concept, it was distributed to religious and charitable uses for the benefit of the dead man's soul. From the ninth century onward, this portion was one-third of the non-allodial property.[16] These gifts were often made shortly before death, and hence came to be known as "the last words" of the decedent, the pastor or confessor acting the part of the salman for the benefit of the pious causes.[17] This portion of the estate, the one-third, became a vested claim by the twelfth century, corresponding with a threefold division of the non-allodial property, one-third for the wife, one-third for the children, and one-third for the dead man's soul. So definitely was this a traditional custom that when a decedent died intestate, it was accorded to the bishop that he should take control of these assets and distribute them on this proportionate basis.[18] At least from the ninth century onward *post obit* gifts of land are found, seemingly of book land, on the theory that such land included within itself a power of appointment,[19] or even of other land by the device of conveying the land with reservation of a life estate.[20] In any event, these gifts were *donationes mortis causa* rather than wills.

[16] Brissaud, *History*, p. 691; Pollock and Maitland, *History*, II, 314, 257, 258, 338-340, 351; Blackstone, *Commentaries on the Law of England* (cited *Commentaries*) (ed. Sharswood, 4 vols., Philadelphia, 1870), II, 32, 491, 492; Hannan, *Wills*, n. 38.

[17] Pollock and Maitland, *History*, II, 250, 315-321; c. 10, X, *de testamentis et ultimis voluntatibus*, III, 26.

[18] Bracton, *De Legibus Angliae*, 2, 26, 2; *Diploma* of Stephen, King of England (1134)—Mansi, XXI, 495 E; Council of Worcester, 1240, c. 50—Harduin, VII, 345; Constitutions of the Bishop of Salisbury (1256)—Mansi, XXIII, 823 A; Council of Lambeth (1261)—Harduin, VII, 543; Council of London (1268), c. 24—Harduin, VII, 631 B; Synod of Oxford (1287), c. 50—Harduin, VII, 1114.

[19] Pollock and Maitland, *History*, II, 250, 315-318.

[20] Pollock and Maitland, *History*, II, 324; Huebner, *History*, p. 744; c. 3, X, *de successionibus ab intestato*, III, 27.

It is precisely in these centuries, the ninth to the twelfth, that the jurisdiction of the Church over all testamentary provisions is considered to have been exclusive both in England and on the Continent. As already noted, the ecclesiastical court was accorded jurisdiction over bequests to charity and religion not only by the canons but also by imperial law. This jurisdiction was vindicated *iure cumulativo,* that is, by reason of the jurisdiction which the bishop enjoyed over the beneficiary, he was charged with the responsibility of seeing to it that the latter was not deprived of its bequest. The jurisdiction over other testaments, which the ecclesiastical courts came to exercise, was acquired *iure devolutivo,* that is, when the secular courts were negligent or incompetent, and it devolved upon the ecclesiastical superior to secure the rights of widows and orphans under those wills. It was under the latter right that the ecclesiastical courts exercised jurisdiction during the dark ages over wills primarily subject to the secular power.[21]

But the twelfth century saw the coming of feudalism and the revival of the formal will. Pope Alexander III combated the latter in his decretals, arguing that the presence of the great number of witnesses required by the Roman will of Justinian was not necessary.[22] His decretals as they stand in the Decretals of Pope Gregory IX are plainly a vigorous defense upon the traditional grounds recognized by the ecclesiastical courts in the centuries immediately preceding. On its part, feudalism definitely withdrew land from testamentary disposition.[23] It also brought into existence numerous probate courts set up in the castles of the lords.[24] The ecclesiast-

[21] Cf. Ottaviani, *Institutiones Iuris Publici Ecclesiastici* (2 vols., Romae, 1925), I, nn. 155-159; cc. 3, 6, 9, X, *de testamentis et ultimis voluntatibus*, III, 26; c. 26, X, *de verborum significatione*, V, 40.

[22] Cc. 10, 11, X, *de testamentis et ultimis voluntatibus*, II, 26.

[23] Cf. Magna Carta, 9 Henry III, c. 36—Blackstone, *Commentaries*, II, 18, 270; Blackstone, *Commentaries*, II, 1, 12; II, 18, 267-273; II, 23, 375; Pollock and Maitland, *History*, II, 250, 255, 315-318; 325-331.

[24] *Selected Essays in Anglo-American Legal History* (cited *Selected Essays*) (3 vols., Boston, 1909), III, 729; Blackstone, *Commentaries*, II, 32, 494.

ical courts were compelled now to struggle to retain their jurisdiction not only over wills in general, but even over bequests to charity and religion. For they conceived themselves still responsible to the widow and the orphan, as well as to pious causes generally, in view of the fact that the conditions of unrest and injustice which characterized the dark ages were hardly ameliorated under the feudal system. The ecclesiastical superiors insisted vigorously that the faithful should make wills, lest the barons should regard the personalty of the intestate as escheating to themselves, as they were too prone to do.[25] On the Continent, it seems to have been a losing struggle, though as late as 1725, the Council of Rome seems to indicate that the ecclesiastical court was the court for the adjudication of wills in the Kingdom of Naples.[26] In England, on the contrary, it was successful. The consequence for England was that the law of wills follows substantially the canon law practice; and that testaments were subject to the ecclesiastical courts down to 1837.[27]

In England, the earliest judiciary system found the bishop sitting with the secular sheriff or alderman in the court of the hundred under the Anglo-Saxon regime. Thus the sentence was at once ecclesiastical and secular. When William the Conqueror came, he complained that this manner of procedure was contrary to the canons, and so separated the ecclesiastical and the secular jurisdiction. Henry I attempted a reunion, but this was opposed by Archbishop Anselm, who ordained that no bishop should be present at the trial of secular suits. When Stephen ascended the throne, he promised under oath that spiritual causes and spiritual persons should be subject

[25] Blackstone, *Commentaries*, II, 32, 495; Pollock and Maitland, *History*, II, 360; I General Council of the Lateran (1123), c. 12—Mansi, XXI, 284 C; II General Council of the Lateran (1139), c. 5—Mansi, XXI, 527 B; Council of Toulouse (1056)—Harduin VI A, 1045; Council of Clermont (1095), c. 21—Mansi, XX, 818; Council of Nantes (1127)—Harduin, VI B, 1129; Council of Anjou (1269), c. 1—Harduin, VII, 647; Council of Merton (1258)—Mansi, XXIII, 982 C.

[26] Tit. 20, c. 2—*Collectio Lacensis*, I, 381.

[27] Pollock and Maitland, *History*, I, 122, 123, 128, 131; II, 336, 337.

to the exclusive jurisdiction of the bishop. The divergence that then developed between the two systems soon became so great as to prevent coalition.[28] Organized in this manner, the ecclesiastical courts had exclusive jurisdiction over wills,[29] and this is conceded by Glanvil in the reign of Henry II,[30] by the Magna Carta of John Lackland,[31] and by Bracton in the reign of Henry III.[32] Indeed, decedents' estates fell under the jurisdiction of the ecclesiastical courts even when there was an intestacy, and this was still law under Charles I.[33]

It was under the influence of this struggle to maintain their rights against the injustices committed by the barons and even tolerated in the courts baron that the formal system of testamentary administration was developed. The thirteenth century is filled with the decrees of provincial councils, on the Continent as well as in England, prescribing the various formalities of probate, inventory, registration, account, and distribution.[34] Though they may be but promulgating in precise form procedure that had become customary, the tenor of the decrees gives ample justification for the conclusion that our whole system of administration, as it has been taken over by courts of probate in England and the United States, owes its origin to this struggle between the ecclesiastical courts and the secular courts to obtain jurisdiction over wills.

Under *The Code of Canon Law*, the authority of the ecclesiastical court over bequests to charity and religion is reasserted.[35] The obligation of probating such a bequest with the Ordinary and of providing him with an inventory of assets

[28] Cf. Charter of William I—Mansi, XX, 605 A; Blackstone, *Commentaries*, III, 5, 61-64.

[29] Pollock and Maitland, *History*, II, 332, 333.

[30] Blackstone, *Commentaries*, III, 7, 96.

[31] *Selected Essays*, III, 727.

[32] *De Legibus Angliae*, 2, 26, 487.

[33] Blackstone, *Commentaries*, II, 32, 492.

[34] Cf. Hannan, *Wills*, nn. 722-728.

[35] Canons 1514, 1515, §§ 1, 3.

and liabilities now rests only on executors who are clerics and religious. The probate can be made orally or in writing. On the other hand, the Code definitely imposes on all executors, laymen included, the obligation of fulfilling such trusts and charges the bishop with the obligation of seeing to it that this duty is properly met even by laymen.[36] Consequently, the bishop could make particular provision in his diocesan statutes enlarging the obligation of probate and extending it also to laymen.

In the case of a religious, if the bequest is meant for his own institute and that institute is at the same time exempt by special apostolic privilege from the jurisdiction of the bishop, the proper Ordinary for probate is his own major superior.[37] This would be the case in four possible contingencies: when the bequest is made for the works of the religious institute in general; when given to a definite house of the institute for its work in that house; when given to the institute for one of its houses or one of its undertakings; and finally when the bequest is made to the community indefinitely for the works of charity. In the first case, there is really an outright gift to the community, and this would be true also of a religious institute that was not withdrawn from the jurisdiction of the bishop.[38] In such a case, the religious executor would not be obliged to make probate with the bishop, unless he was executor of other legacies, too, or unless his institute was directly under the jurisdiction of the bishop in all its financial administration.[39] This obligation is imposed by the Code not only on the executor of the will but also the executor of the legacy, that is, he who receives the legacy from the executor of the will for the purposes named by the testator.[40]

[36] Canon 1515, § 2.

[37] Canon 1516, § 3.

[38] Cf. Hannan, *Wills*, n. 788.

[39] Canon 535, § 3.

[40] Canon 1516, §§ 1 and 3.

The ecclesiastical courts never exercised the doctrine of *cy pres* to any great extent, and when it was exercised it was only in the extremely limited application of that doctrine as recognized by certain of our States today, that is, to the extent of changing the method only, and not the object, of the testator's will.[41] However, the Holy See, even through its tribunals and congregations, is competent and the Code asserts the right of the Supreme Pontiff to make any change in the testator's will even to the full extent of the *cy pres* doctrine, but only for a just and necessary cause.[42] Consequently, a modification obtained by the allegation of falsehoods is void. On the other hand, if the plan of the Holy See fulfills the purpose of the testator better than his own plan, it is held that a just cause exists.[43] In practice, where the secular court would make such a modification under *cy pres,* it would still be necessary for the Catholic executor, or the Catholic beneficiary, through his proper bishop, to obtain a similar accommodation from the Holy See, if the bequest involved was a bequest to a pious cause.

Under the Code, the bishop can interfere only when it becomes impossible to fulfill the testator's wishes and when the administrators are not responsible for this consequence.[44] The Council of Trent had extended a privilege which was practically the same as this. It declared that when there are so few cases of charity of the kind which the testator had in mind as to make his bequests impractical, the bishop with two skilled capitulars could make that modification which would most clearly comply with the testator's design, unless the testator

[41] Cf. c. 3, X, *de testamentis et ultimis voluntatibus,* III, 26.

[42] Canon 1517, § 1; Schmalzgrueber, III, III, 26, 213; Vromant, *De Temporalibus,* n. 167; *Collectanea Sacrae Congregationis de Propaganda Fide* (2 vols., Romae, 1907), n. 689.

[43] S.C.C. *in Causa Tolentina,* 13 iun. 1744, § *Urget*—Pallottini, XI, 646; S.C.C. *in Causa Albintimilien.,* 25 ian. 1772, § *Addunt*—Pallottini, *loc. cit.;* S.C.C. *in Causa Nucerina,* 15 mart. 1794, § *Suam*—Pallottini, XI, 602; Hannan, *Wills,* nn. 794-796.

[44] Canon 1517, § 2.

had forbidden modification. This language indicated that even the moral impossibility of fulfillment justified the bishop's intervention.[45] For instance, he might change the site prescribed for the erection of a monastery in order that it might not be built adjacent to a public street, a site forbidden by the Council of Trent.[46] On the other hand, if it is only a condition that is imposible of fulfillment, it is considered as not written; and this is true also of a condition, the fulfillment of which is substantially illicit; for instance, if the bequest were granted on condition that the testator be avenged.[47] The bequest will stand, if this be possible when the conditions are ignored.[48]

Further, when it is impossible to ascertain what the obligation is under the will, or precisely who the beneficiary is, the bishop is also competent to name the object or the beneficiary.[49] Indeed, he may change either, if he is empowered to do so by the testator or has been delegated by the Holy See. And the same competence enjoyed by the bishop in these matters belongs also to the major superior of a religious institute that has been withdrawn from the jurisdiction of the bishop.[50] When any modification whatsoever is made, a hearing must be granted to all parties interested, for instance, the heir and the beneficiary.[51]

On the other hand, it would seem that the bishop can make a compromise with the wife and children of a testator if the latter has deprived them of that share, which was recognized

[45] Sess. XXV, *de ref.*, c. 8.

[46] S.C.C. *in Causa Ariminen.*, 30 ian. 1779—Pallottini, XI, 644; cf. Wernz, *Ius Decretalium* (6 vols., Romae et Prati, 1898-1905), III, n. 283.

[47] Schmalzgrueber, III, III, 1, 9, 33.

[48] D'Annibale, *Summula Theologiae Moralis* (3rd ed., 3 vols., Romae, 1891), II, n. 365; Vromant, *De Temporalibus*, n. 170.

[49] Barbosa, *De Officio et Potestate Episcopi* (Lugduni, 1656), III, 83, 16-21.

[50] Cf. Barbosa, *ibid.*, n. 16; Schmalzgrueber, III, V, 41, 137; Hannan, *Wills*, n. 804.

[51] Canon 1517, § 2.

by the canonists of the Middle Ages, that is, a third for the wife and a third for the children, or if only a wife or only children survive, one-half for the relatives. Undoubtedly, the wife and children have natural rights to be supported out of the estate of the decedent, and canon law, being human law, can never conflict with the natural law. The problem, of course, is to determine to what extent they have a right to recognition. The rule of the Middle Ages seems susceptible of adoption now, since the Code is silent on the matter, as indeed the general law of the Church has been throughout the ages. This conclusion does not lack practical importance even in this country, for instance in Louisiana,[52] which has enacted statutes derived from the Roman law prescribing that a legitimate portion of the decedent's estate must be reserved to the descendants. Similar statutes are found in several other States, as well as statutes revoking wills in favor of a child born later than the making of the will or of a child not mentioned in the will, or causing the legacies to abate in favor of such children, or in favor of a wife or husband by reason of the claims of homestead exemption, dower, curtesy, and rights in community property. The statutes discriminating solely against charity and religion in favor of the heirs seem to be class legislation and directed against charity and religion rather than in support of the natural rights of the heirs. If, on the other hand, they prescribed that a testator might not bequeath more than a certain portion of his estate to strangers, including charity and religion, beyond a certain degree of kindred, they would seem to be free of that stigma.[53]

II. Formalities

Though statutes of the secular law favoring the natural rights of the decedents' kin are entitled to recognition by the ecclesiastical court, it is not so with the legal formalities required for the validity of the document itself, that is, when

[52] Civil Code 1940, Art. 1493-1495.

[53] Cf. Hannan, *Wills*, nn. 145-170, especially nn. 148, 149, 156, 159.

pious causes are involved as beneficiaries. It is at this point in the paper, then, that the transition to a consideration of the formalities is appropriately suggested. Even before the end of the century of Justinian, numerous Church councils in the regions conquered by the Franks were ordaining that wills are valid even though they fail in some of the requirements of the secular law.[54] The language of these Councils is general, but the aim is undoubtedly to protect bequests in which the Church is bound to have a special interest. Thus from the fifth century onward, the nations of the West commenced receding from the Roman rules as to testamentary formalities.[55] Indeed, from the time of the IV Council of Orleans (541), formalities were no longer permitted to invalidate wills of themselves. Henceforth, it sufficed that the intention of the testator was clear. And this test came to be accepted even by the secular authorities.[56] Indeed, canon law seems in this matter to have abrogated both Roman and Gallic law in France, though during that period of adjustment both laws were tolerated in other matters.[57] As has been noted, the wills of the period were formless. Holographic testaments grew up among the customs of the various districts of France.[58]

This statement of the case offers a logical explanation for the decretal of Pope Alexander III, to which reference has al-

[54] IV Council Orleans (541), c. 19—Harduin, II, 1438; III Council Paris (557), c. 1 (in approving this Council, Clothaire I permitted the ancient inhabitants and their posterity to be governed by Roman law, but in this present matter of the formalities required in testaments, he derogated the provisions of the Roman law)—Harduin, III, 337 and 343; Council of Lyons (567), c. 2—Harduin, III, 354; II Council Tours (567), c. 25—Mansi, IX, 804 D; Council of Macon (581), c. 4—Mansi, IX, 932 D; V. Council Paris (615), cc. 6, 10—Harduin, III, 552, 553.

[55] Phillips, *Compendium Iuris Ecclesiastici* (Ratisboniae, 1875), p. 406.

[56] Thomassin, *Vetus et Nova Disciplina Ecclesiae circa Beneficia et Beneficiarios* (Venetiis, 1773), III, 1, 24, 4; *Dictionnaire Encyclopédique de la Théologie Catholique* (26 vols., Parisiis, 1859), VI, 397, s.v., "Dispositions Testamentaires".

[57] Pollock and Maitland, *History*, I, 13, 14; Thomassin, *ibid.*, n. 2.

[58] Cf. Parker, "History of the Holograph Testament in the Civil Law"—THE JURIST, III (1943), 5-23.

ready been made, abrogating in a written canonical document the requirements of the Roman law as to testamentary formalities. The Supreme Pontiff was not introducing new legislation, nor was he merely legislating for the temporal domain of the Roman See. He was only defining what was already the universal customary law of the Church, developed through the centuries following the barbarian invasions and accepted by the barbarians in lieu of the provisions which they could not find in their own laws.[59] He was struggling against innovation, as he states himself. He was fighting a strenuous attempt to extend the influence of the recently revived Roman law everywhere and in every field at the expense of the solidly entrenched customary law. He issued a separate decretal touching wills to pious causes.[60]

In the former decretal, he required the presence of the priest as the official witness, filling, as it were, the position of a notary. This function of the priest seems also to have grown up in virtue of the customary intervention of the pastor in aiding his parishioners to make their wills.[61] The provincial councils followed the leadership of the Supreme Pontiff, supplying law for the administration of wills in the ecclesiastical courts.[62] And the III General Lateran Council adopted the

[59] Thomassin, *op. cit.*, III, 1, 24, 6; Wernz, *Ius Decretalium*, III, n. 274.

[60] Thomassin, *ibid.*, n. 4.

[61] C. 10, X, *de testamentis et ultimis voluntatibus*, III, 26. This decretal reads in free translation: Alexander III to the Bishop of Ostia. When, my brother bishop, you visited me, you explained that there is a custom obtaining in your diocese by which those constituted in authority rescind wills made without the subscription of seven or five witnesses as the human laws [i.e., Roman law] decree. But since that is more rigorous than the requirements of the divine law, of the precepts of the Fathers, and of the *general customary law* [italics inserted] of the law of the Church, since it is written, "In the mouth of two or three witnesses every word may stand [Matt. xviii, 16]", we condemn the new custom, and we decree as permanently valid the wills which your subjects may make in the presence of their priest and of three or two other suitable persons, and we forbid that such wills be henceforth rescinded under penalty of excommunication.

[62] Hannan, *Wills*, nn. 458-465.

decretal (1179).[63] As already observed, since the ecclesiastical courts in England retained jurisdiction over all wills, the provisions of this decretal came to dominate the common law of England, requiring only two or three witnesses, instead of the seven which came to be demanded in the secular courts of the Continent under the influence of the revived Roman law. As late as 1725, the Council of Avignon and the Council of Rome required the presence of the priest,[64] though after the Protestant revolt, this provision fell into desuetude almost everywhere. Certainly under the present Code, there is no mention made of his function as official notary, even as to pious causes.

On the contrary, the Code requires the observance even by clerics of the formalities imposed by the secular law, and it would seem under penalty of invalidity, unless the bequest is one made to charity. Even as to such bequests the Code desires and imposes as an obligation the observance of the formalities of the secular law. Though many canonists would maintain that in no case are secular formalities obligatory in conscience, none today would hold that any one could ignore the decision of a secular court based on the absence of those formalities, except of course in the case of bequests to pious causes.[65]

As to bequests made to pious causes, the decretal of Pope Alexander III required two or three witneses also for them, though not the presence of a priest.[66] But canonists were un-

[63] Pars 50, c. 8—Mansi, XXII, 429 C.

[64] Tit. 47—*Collectio Lacensis*, I, 581 a.

[65] Schmalzgrueber holds for the invalidity even prior to judicial sentence—III, III, 26, 34, 39; Noldin holds that this is the case at least under the Austrian and German Codes—*Summa Theologiae Moralis Iuxta Codicem Iuris Canonici* (20th ed., Oeniponte, 1930), II, n. 561; Lehmkuhl thinks that the formalities in English Law are so few that the absence of them causes invalidity—*Theologia Moralis* (9th ed., 2 vols., Friburgi Brisgoviae, 1898), I, n. 1146; Vermeersch requires the judicial sentence—*Theologia Moralis*, II, 348; and so does Genicot — Genicot-Salsmans, *Institutiones Theologiae Moralis* (11th ed., 2 vols., Bruxellis, 1927), I, nn. 610, 673, 674.

[66] C. 11, X, *de testamentis et ultimis voluntatibus*, III, 26. This decretal in free translation reads: [To the judges of Velletri] It has come to our knowl-

animously agreed that the Supreme Pontiff required these witnesses only for the purpose of probate, as is the case now under the secular law of Pennsylvania with regard to all bequests. This was the opinion constantly followed by the Rota. It was held, therefore, that a document merely signed by the testator would suffice, even a private document, and words orally uttered, and even a mere nod.[67] During the last century the view grew up that this decretal had become obsolescent outside the Papal domains.[68] The Code seemed to clarify the matter by reasserting the peculiar privilege of charitable bequests. However, it places the burden not directly on the beneficiary who takes the bequest that should have gone to a pious cause had it not been for the failure of due legal formality, but rather upon the bishop to warn the beneficiary of his duty to observe the privilege.[69] Because of the difficulty of enforcing such observance contrary to a distribution awarded by a secular court, some authors have attempted to let the obligation rest upon the clergy and to consider it as discharged when they have warned the beneficiary of his obli-

edge that when it becomes your duty to scrutinize bequests to the Church it is your wish to proceed according to human law and not according to the divine, and that unless the will has been witnessed by seven or five witnesses you dismiss it without judgment. Now since these cases pertaining to the jurisdiction of the Church should be adjudicated not according to secular law but according to the canons, and under these, by the authority of Holy Scripture [Matt. xviii, 16] two or three witnesses suffice, we command that when any such case is brought to your tribunal you shall judge it not according to secular law but according to the statutes of the ecclesiastical decrees, requiring no more than three or two lawful witnesses, because it is written, "In the mouth of two or three witnesses every word may stand."

[67] Cf. De Luca, *Theatrum Veritatis et Iustitiae* (16 vols., Coloniae Agrippinae, 1706), XIV, 7; Schmalzgrueber, III, III, 26, 46; Reiffenstuel, III, 26, 155; Pirhing, III, 26, 12; Soglia, II, 4, 122; Phillips, *Compendium Iuris Ecclesiastici*, p. 407; Wernz, *Ius Decretalium*, III, nn. 274, 279; Lehmkuhl, *Theologia Moralis*, I, n. 1162.

[68] This is the view of D'Annibale—*Summula Theologiae Moralis*, II, n. 339; Prümmer cites as holding the same opinion, Daelman, Haine, and Retzbach—*Manuale Theologiae Moralis* (6th and 7th ed., 3 vols., Friburgi Brisgoviae, 1933, II, n. 277.

[69] Canon 1513, § 2.

gation of restitution.[70] Even after an authentic interpretation was given by the Commission appointed for the precise purpose of interpreting the Code,[70a] these authors dissected the response. The response had said that the words of the canon imposing the necessity of warning the beneficiary were mandatory and not merely exhortatory. Their analysis restricted the newly emphasized obligation to the clergy, as is justified, but persisted in liberating the beneficiary from the obligation of restitution. One must nevertheless ask whether the legislator would attempt anything so futile as to *command* merely an exhortation on the part of the clergy, if it was not meant to require obedience from the persons subjected to the exhortation? On the other hand, a compromise is possible, as the Holy See has indicated in decisions that preceded the promulgation of the Code.[71] Indeed, in this situation, if it involved the necessity of a prompt decision prior to the contesting of a will invalid because of a lack of due formality, the bishop himself might effect a compromise. This conclusion, of course, presupposes contumacy on the part of the heirs following the required admonition duly made by the bishop. He would in a measure be modifying the testator's bequest, but there is involved here the impossibility of fulfillment because of the lack of due form.[72]

As to mortmain provisions that would invalidate bequests made within a certain period antedating death, these are not regarded as pertaining to the form, and consequently even the authors who would relieve the beneficiaries under a bequest to

[70] Prümmer, *loc. cit.* and Noldin, *op. cit.*, II, n. 556, hold this view as probable and they would therefore not impose an obligation on the beneficiary even in conscience.

[70a] 17 feb. 1930—*AAS*, XXII (1930), 196; *AER*, LXXXIX (1933), 528.

[71] Cf. S. Paenit., 23 iun. 1844—*Acta Sanctae Sedis*, II (1866), 369; for a reply of the Sacred Penitentiary in 1901, cf. *Collectanea Sacrae Congregationis de Propaganda Fide*, n. 2099. The readiness of the Holy See to permit a compromise was reaffirmed in a reply of the Sacred Penitentiary of April 23, 1927 —Vermeersch, "De testamento ad causas pias et canone 1513, § 2"—*Periodica*, XIX (1930), 49*-63*.

[72] Cf. Canon 1517, § 2.

charity, invalid in form, would not agree to this in the case of a will valid in form but made within a prescribed time antedating death, with the resultant invalidation of charitable bequests contained in it.

However, even under canonical legislation, parol evidence is not competent to show that a will was meant to speak otherwise than it does. Parol evidence was offered in a given case to show that a certain archbishop intended his whole estate to be divided between two pious causes named in his will, but the evidence was excluded as to an item of the estate not mentioned in the will. And it was stated that such evidence may be admitted to interpret a patent ambiguity, but not to establish what does not appear on the face of the will.[73] On the other hand, in another case, oral testimony was admitted to show that the testator wished the amount specified in the will to be given to each of two beneficiaries and not one-half of it to each.[74]

But under the canons an executor can be empowered to appoint a legatee, for instance he can be directed to distribute a thousand dollars to whatever charitable cause he might choose.[75] This is in conflict, of course, with the American secular law, under which the testator must at least designate the class of persons he intends to benefit under the legacy, permitting at most the executor to select the individuals from the class.

And *donationes mortis causa* made to pious causes may include all kinds of property in any amount, for the canons will sustain them as bequests or as last wills even though lacking in the requirements imposed by the secular law or disposing of amounts or types of property not subject to *donationes mortis causa* in the secular law. Further, revocation of such gifts when a pious cause is beneficiary does not occur upon

[73] S.C. EE.RR., 13 aug. 1869—*Acta Sanctae Sedis,* V (1869), 92.

[74] S.C.C., *in Causa Ariminen.,* 24 iul. 1858—Pallottini, XI, 561; cf. also S.C.C., 27 feb. 1875—*Acta Sanctae Sedis,* VIII (1874), 575.

[75] C. 13, X, *de testamentis et ultimis voluntatibus,* III, 26, a decretal attributed to Pope Innocent III.

recovery unless explicitly or implicitly effected by the donor after his recovery. And even if delivery is made to a third party acting as agent for the donor only after the death of the donor, the gift is sustained by the canons. Moreover, delivery that would be regarded insufficient under secular decisions would suffice under the canons, when the beneficiary is a pious cause: as for instance the delivery of the donor's receipt for stock in the hands of a third person; of his pass book containing the record of his checking account; of a check on such account; of a promisory note.[76]

Of course, in the case of these informal dispositions, the ecclesiastical court is confronted with the problem of proof. But if reliable witnesses are at hand to prove the facts alleged in the foregoing, the ecclesiastical court would uphold the gift.

III. Capacity

The final problem which this paper has set itself to consider is the capacity of the testator. The Code authorizes any person, not disqualified by the natural law or the canon law to make bequests to pious causes.[77] This is not a proof that a man has a natural right to make a will. Most canonists have maintained that he has.[78] But there is another view that traces the origin of the right to have a will enforced after death merely to positive law, either secular or, in the case of pious bequests, canonical.[79] Of course, after positive law intervenes, authorizing wills, then a natural right arises in virtue of the

[76] Cf. Hannan, *Wills*, nn. 54-60.

[77] Canon 1513, § 1.

[78] This is the view of Reiffenstuel, III, 26, 28; Pirhing, III, 26, 2; Pichler, *Candidatus Iurisprudentiae Sacrae* (5 vols., Augsburg, 1723), III, 26, 4, 47; Wernz, *Ius Decretalium*, III, n. 274; Santi, *Praelectiones Iuris Canonici* (2nd ed., 5 vols., Ratisboniae, 1892), III, 26, 2; Cavagnis, *Institutiones Iuris Publici Ecclesiastici* (Pars 2a Specialis, 2nd ed., Romae, 1889), n. 356; and Lehmkuhl, *Theologia Moralis*, I, n. 1143.

[79] This is the view of Schmalzgrueber, III, 26, 4, 5; Zallinger, *Institutiones Iuris Naturalis et Ecclesiastici Publici* (Romae, 1823), I, § 120; *idem, Institutiones Iuris Ecclesiastici* (Romae, 1823), Prolegomena, § 47; III, 326. Cf. also Ballerini-Palmieri, *Opus Theologicum Morale* (7 vols., Prati, 1893), III, n. 697.

positive enactment, and that right binds not only one's fellow citizens, but also the State itself, until it repeals the enactment.

The arguments that would contend that the right is natural independent of any legislative action of human authority seem to contemplate various phases of disposition of property that are not strictly testamentary. For instance, it is said that a man has a right to acquire not only for himself, but also for others.[80] That argument is merely a justification of agency. And what a man acquires by agency, his principal can take from him at any time.

It is also said that the *ius gentium* endorses the right of man to make a will. It is contended that all nations have recognized the right of a man freely to choose those to whom he will leave his property. As we have already seen, all nations have not recognized this right; indeed, wherever the institution of the will is found, there is found a long development out of intestate succession governed by positive law, beginning in the departure from that succession in a right to name an heir in the absence of one recognized by the law. This heir took the whole property, just as if he had succeeded under an intestacy. It was only gradually that the testator was permitted to distribute his property by testament. Moreover, in the early state of this development, many, if not all, the transactions were irrevocable gifts *inter vivos* with a condition precedent, namely, the death of the testator. Certainly, man has a natural right to dispose of his property *inter vivos*.

Finally, the issue is confused by reference to the natural right of the wife and children to be provided for. This is their natural right, not the natural right of the testator to provide for them by will. It is conceivable that they can be provided for by statute.

The argument that maintains the opposite finds it difficult to conceive that a corpse which is not a subject of rights can enjoy rights; and it wonders why if that natural right exists

[80] This is an argument of Cavagnis, *ibid.*, n. 359.

for a year after the death of the deceased, it does not exist for a million years.[81] How can the State limit it to a year, if it is a natural right? No one seriously contends that the State can not do so. True, the realistic philosophers would not be disturbed by this question, because for them there exists no natural law and no natural rights. The State is the last resort. The State is all. But not even legal philosophers who rightly defend the natural law would challenge the right of the State touching the legislation just indicated.

But the Code does provide that the disqualifications of secular law are inoperative where bequests to pious causes are involved. The question may be asked whether under this canon the unbaptized are given capacity to make such bequests. The answer must be that they are. For, although the unbaptized are not subjects of ecclesiastical law,[82] nevertheless the pious cause is subject. Therefore the law which has exclusive jurisdiction over the recipient, gives it capacity to take a bequest from an unbaptized person who labors under a disqualification of the secular law.

As to the age of the testator, two problems arise under the Code, touching the wills of minors. One concerns the age at which a bequest may be made to pious causes; the other, the property of which disposition may be made. As to the latter problem, the simplest answer is that the minor may give what is his own. Gifts from friends and property he has inherited belong to him under secular law in the United States, but not his earnings. In foreign countries, the earnings usually belong to the child. The provisions of secular law govern as to what property the child may acquire in ownership; and consequently indirectly as to what funds are at his disposal for distribution to pious causes.

As to the age at which a minor has the right to make a bequest to pious causes, puberty seems to be the lowest limit beyond which modern secular jurisprudence does not recog-

[81] Cf. Schmalzgrueber, *loc. cit.*; Blackstone, *Commentaries*, II, 1, 10.

[82] Cf. Canons 12, 87.

nize testamentary capacity.[83] Indeed, this doctrine rests on the Roman law and on the law of English ecclesiastical courts. Under the Code, persons who have completed their seventh year are legally presumed to possess discretion; those under that age are presumed to lack it.[84] On the other hand, the Canons recognize clearly that there is something of discretion lacking in those who have not reached the age of puberty. They exempt such persons from ecclesiastical penalties.[85] But it would seem that they require only the age of discretion in those whom they would authorize to make a bequest to pious causes. However, the possession of discretion would be merely a presumption that would yield to contrary proof.

The Code requires, however, that a person under the age of twenty-one years, making such a bequest, must have the consent of his parent or guardian.[86] He is bound by this obligation whether he be married or emancipated by secular process. But the consent of the parent or guardian does not seem to be necessary for the validity of the will.[87] The failure to obtain it renders the will rescindible. The will is therefore capable of tacit ratification either by the minor himself after he attains the age of majority, or by the parent whose consent was not obtained. What should be said if the parent or guardian knew nothing of the bequests until after the death of the minor testator? Does the will become irrevocable by his death, on the ground that he is no longer capable of revoking it? No, for the right of rescinding resides with the parent. On the other hand, at the minor's death, the guardian ceases

[83] Georgia regards only those under fourteen years of age as lacking the necessary discretion—§§ 113-201. Maryland permits wills touching personalty to be made by children of fourteen and twelve respectively—Art. 93, § 336 (Annotated Code, 1939).

[84] Canon 88, § 3.

[85] Canon 2230; cf. also Canon 555, § 1 (requiring fifteen years of age for admission to a novitiate) and Canon 1067, § 1 (setting sixteen and fourteen as the age limits for marriage).

[86] Canon 89.

[87] Cf. Canon 11.

to have a ward. Hence the basis of his authority is gone. The will is not subject to him, but to the ecclesiastical authority. It becomes necessary for the judge to determine whether the minor showed sufficient discretion in making the will, the whole purpose which the Code has in requiring the consent of the parent or guardian. Obviously, the minor should be expected to make due provision for his parents, and failure to do this would result in an official obligation of the ecclesiastical judge to correct this fault.

As to mental capacity, the canonists differ but little from the secular law in their view of what incapacitates a man in this respect. Obviously, the ecclesiastical judge can not sustain a bequest to charity made by one who lacked mental capacity.[88] It is clear to every attorney how far the secular courts will go in order to uphold a bequest, for instance in the sustaining of a bequest made by a man who ate with his cats and dogs, played a violin while his wife lay dead in the house, and slept in the box in which she was to be buried.[89] The general rule that guides our secular courts is derived from the natural law and is adequate for the ecclesiastical judge. That rule is that at the time when the will is made, the testator must understand the meaning and the general effect of the act he is performing, with a memory sufficiently strong to gather all the elements together mentally, without prompting, and to hold them in his mind long enough to enable him to grasp their more evident relations and to make a rational judgment concerning them. The ecclesiastical judge should regard the will as made by one capable of testamentary disposition, unless the will is contested. Then if evidence is offered to nullify the presumption of sanity, he should require proof of sanity, from laymen and alienists. The time at which soundness of mind must be proved is the time of the making

[88] Cf. Canon 88, § 3: Infanti assimilantur quotquot usu rationis sunt habitu destituti. Cf. also Canon 1648, § 1.

[89] Bennett v. Hibbert (1893), 88 Iowa 154, 55 N. W. 93.

of the will. But state of mind antecedent, concomitant, and subsequent is not without probative effect.[90]

The Code makes certain acts performed under duress invalid, though they would be invalid under the natural law only when freedom of choice is completely obliterated.[91] However, an act performed under duress is always rescindible at the request of the party injured or even on the motion of the ecclesiastical judge himself. In the case of a will, since the deceased testator is the only person injured, the ecclesiastical judge alone is competent to rescind it.[92] If a *prima facie* case of duress is established and not rebutted, the ecclesiastical judge should find against the will.

Errors of law or fact do not invalidate a bequest to pious causes under the canons, just as they do not under the secular law invalidate wills unless the error amounts to a mistake as to the form of the instrument or as to the existence of a child who might be beneficiary *ab intestato*. The canons prescribe that error invalidates an act only when it amounts to a mistake as to the substance of the act or as to a condition without which the act would not have been performed. Valid contracts, under the canons, are subject to a suit for a rescission, when an error on any point can be established,[93] but it is held by the tribunals of the Holy See that a bequest made to a pious cause under a false impression as to an obligation is beyond rescission.[94] The reason seems fairly obvious. The deceased testator is no longer capable of rescinding; and there is no other surviving party to the contract except the pious cause, the beneficiary. Prospective legatees have not been in-

[90] Cf. Allers, "Some Medico-Psychological Remarks on Canons 1068, 1081 and 1087"—THE JURIST, IV (1944), 358-372.

[91] Cf. Canons 169, § 1, 1°; 185; 542, 1°; 572, § 1, 4°; 1087, § 1; 1307, § 3; 2205, § 2; 2238.

[92] Canon 103, § 2.

[93] Canon 104.

[94] S.C.C. *in causa Neapolitana*, 20 dec. 1732, § *Quo*—Pallottini, XI, 570; *in causa Bosanen.*, 13 mart. 1762, § *Denique*—Pallottini, XI, 570.

jured, unless they be the wife or children, and their natural right is otherwise protected by the canons.

The limits of time are insistent in their claim that even the most appreciative and attentive audience shall at length receive an adequate reward for its patience in the seasonable conclusion of the program. It were error for the most entertaining speaker to presume otherwise, error that might invalidate all his effort by straining the capacity of his audience. Language and time are so coordinated in their conspiracy against thought that ideas are permitted liberty only in a concealing mass of sounds and seconds. Thus, though much remains to be said on a subject of which but the briefest outline has been presented as the minutes raced by, it is imperative that we bow to the inevitable and recognize the significance of the hour. In conclusion, a fervent expression of gratitude is offered my distinguished audience and the sincere hope is entertained that its exterior courtesy sprang from grace received as well as grace bestowed.

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THE JUDICIARY DEPARTMENT OF THE CHURCH *

AS soon as the Church was instituted by Christ it immediately began to exercise the judicial power that belonged to it as a perfect society by settling the controversies of its members.[1] It was customary for the litigant parties to appear before the Bishop and accept his decision.[2] In fact, St. Paul the Apostle strongly protested to the Corinthians because some Christians had summoned their brethren before the civil courts in contravention of the exclusively authority of the Church over its own members (I. Cor. VI, 1).

Although the Church did not, immediately after its institution, draw up completely its own special type of procedure, nevertheless the rather summary judicial proceedings of the primitive episcopal Tribunals were trials in the true sense of the word.[3] After religious freedom was granted to Christians by Constantine, and Christian principles were asimilated both by the Roman Law and the Roman Judges, the Church allowed the faithful to submit their differences either to the ecclesiastical or the secular tribunals. At the same time the Roman law began to recognize the jurisdiction of the ecclesiastical courts over cases of the faithful. In fact for such cases the Roman law granted to the Bishops the same jurisdiction

* Lecture delivered February 14, 1944, under the auspices of the Guild of Catholic Lawyers in New York City by Very Rev. Robert E. McCormick, J.C.D., Officialis of the Ecclesiastical Tribunal of the Archdiocese of New York, President of The Canon Law Society of America, and former Chancellor of the Military Ordinariate.

[1] Roberti, *De Processibus* (2 vols., Romae: Apud Aedes Facultatis Iuridicae ad S. Apollinaris, 1926), I, 1.

[2] Cf. Ojetti, *Catholic Encyclopedia*, s. v. "Courts" (IV, 447 f.).

[3] Ojetti, *loc. cit.*

as possessed by the civil magistrates. The Bishops were invested with jurisdiction for both ecclesiastical and secular cases, which the parties voluntarily submitted for their decision.[4]

Therefore we see how Canon Law began to feel the influence of Roman Law. It is not strange then that the Church borrowed from Roman Law such expressions as *citation, joining of the issues, definitive sentence, interlocutory sentence,* a *matter irrevocably adjudged, appeal,* and others.[5] In fact, the canonist sees a remarkable similarity between the steps of procedure and the terminology of the time of Justinian and the Fourth Book of *The Code of Canon Law.*[6]

The second great influence which was brought to bear upon the development of canonical procedure was occasioned by the conversion to the Christian religion of some of the Germanic peoples, which took place early in the history of the Church. Here again we find a development similar to that which took place in the Roman Empire. The influence of Christian principles was soon felt in the Germanic law and, at the same time, the Church found in the Germanic law principles which it accommodated to its own law, such as the method of computing the degrees of blood relationship, the principle of the territorial effect of law and the oath to engender credence.[7]

Thus we see that eclesiastical judicial procedure is a synthesis of certain provisions of the Roman, Germanic and more recent legal systems, which the Church borrowed and perfected, adding to them all during the ages its own canonical

[4] *Codex Justinianus,* I, 4, nn. 7-8—*Corpus Juris Civilis* (Krueger-Mommsen-Schoell-Kroll, 3 vols., Berolini: apud Weidmannos, 1912-1922), II, 40.

[5] Cicognani, *Canon Law* (2nd ed., authorized English version by J. O'Hara and F. Brennan, Philadelphia: Dolphin Press, 1935), p. 48; Sherman, *Roman Law in the Modern World* (2nd ed., 3 vols., New York, 1924), II, 408 ff.

[6] *Institutiones,* IV, 6, 24; IV, 11, §§ 3-5; IV, 13, § 8; IV, 14, §§ 2-3. *Digesta,* III, 3, 41; I, 16, 9, § 5; III, 1, 1, § 4; XXVI, 10, 3, § 15; XXII, 4, 2. *Codex,* II, 12 (13), 4: II, 12 (13), 18; IV, 21, 20; IV, 20, 9. (Cf. *Corpus Juris Civilis,* vols. I, II).

[7] Cicognani, *op. cit.,* pp. 51 ff.; Roberti, *op. cit.,* I, 2 ff.

principles. The result of all these influences is presented in the Fourth Book of *The Code of Canon Law*—known as the *Book on Legal Processes.*

The Fourth Book of the Code is divided into three parts. The first outlines the procedure to be followed in ordinary trials in the ecclesiastical court; the second deals with the procedure in beatifications and canonizations of saints; the third treats of the formalities to be observed in certain other affairs, such as the removal and transfer of pastors, in proceedings against clerics breaking the law of residence, etc.

The Code of Canon Law defines an ecclesiastical trial as "the legal discussion and settlement before an ecclesiastical tribunal of a controversy in a matter about which the Church has the right to pass judgment." The object matters of canonical trials are the following: First, the prosecution or vindication of the rights of physical or moral persons, or the declaration of the juridical facts concerning such persons, for example, the validity of ordination or marriage. These are called *contentious trials,* in which rights are contested. Second, crimes or offenses with a view of inflicting or declaring a penalty. These are called *criminal trials.*[8]

The Code holds that it is the proper and exclusive right of the Church to pass judgment in regard to the following matters:

(1) Cases which relate to spiritual matters, such as controversies about faith, morals, or the Sacraments.

(2) Cases involving temporal matters connected with spiritual matters, such as ecclesiastical burial and legitimacy of children.

(3) Cases involving violation of ecclesiastical laws and all other actions implying sin, in so far as the decision on the guilt and the infliction of ecclesiastical penalties is concerned.

(4) All contentious or criminal cases of persons, who by ecclesiastical law enjoy the privilege of the ecclesiastical

[8] Canon 1552.

forum, that is, the clergy and members of religious communities.[9]

The *Holy Father* himself has this *right of immunity from trial by civil or secular courts* because he is the Vicar of Christ on earth. His immunity therefore is of divine origin and law since Christ Himself instituted the papacy and the present Holy Father is the successor of St. Peter, the first Pope of Rome. As far as other ecclesiastical persons are concerned, their immunity arises from the fact that it was granted to them through the ages by the laws of various countries. It also seems most fitting that the clergy who, by their calling, take precedence over the laity, should not be judged by the latter.[10]

Some modern states, especially those having a concordat with the Holy See, have granted immunity from civil trial to the clergy but with variations in regard to the extent of this concession. Among such states are Poland, Spain, Italy, the Republic of Haiti, and Colombia.[11]

Besides cases which belong exclusively to the ecclesiastical forum, there are other cases in which both the ecclesiastical and secular, or civil, courts have concomitant jurisdiction. They are called in Canon Law "*cases of mixed forum.*" Such cases are of two types, namely, cases dealing with temporal matters, but which involve some separable spiritual quality, and cases dealing with spiritual matters which present some temporal aspect. An example would be a case involving the mere existence of a spiritual fact, such as a marriage or a baptism—excluding, however, any question in regard to the validity of the act. However, these days the Church is wont to leave such matters to the civil courts. In fact, the Code explicitly states that matters pertaining to the civil effects of marriage are to be left to the civil courts unless they are proposed as incidental, or accessory, to some other case which is

[9] Canons 120, 614, 680.

[10] Wernz-Vidal, *Jus Canonicum* (7 tomes in 8 vols., Romae: Apud Aedes Universitatis Gregorianae, Vol. VI, *De Processibus*, 1927), p. 44, n. 37 ff.

[11] Roberti, *op. cit.*, I, 91, footnote (1).

pending before an ecclesiastical court.[12] In regard to cases of concomitant jurisdiction, the Code lays down the principle of "*prevention*" or "*priority*", so that the first court to accept the complaint, or prosecute the defendant, has the right to judge the case.[13] If a plaintiff, in contravention of this principle, takes a case of the mixed forum to a civil court, after it has been presented to an ecclesiastical tribunal, a just penalty can be inflicted upon him. Moreover, he forfeits the right to bring action in the ecclesiastical court against the same person in the same case, or in any matter connected with that case.[14]

As far as *jurisdiction over persons* is concerned, the Church holds that it is certainly competent to try the ecclesiastical cases of all those who have been validly baptized, regardless of whether they are Catholics or non-Catholics. This may seem an unwarranted assumption as far as baptized non-Catholics are concerned; however, it is quite logical when we consider that the Catholic Church considers itself to be the original and true Church established by Christ. He made baptism the entrance to His Church, and *The Code of Canon Law* states that by baptism a man receives juridical personality in the Church, with all the rights and obligations of a Christian, though actually he may not be able to exercise these rights because he is not a member of the physical body of the Catholic Church.[15] It is a logical corollary of this principle that unbaptized persons are not direct subjects of ecclesiastical jurisdiction. However, they may become subject indirectly if they make juridical contracts with baptized persons, such as a marriage.[16]

The next question is whether there is any baptized person who is *immune from judgment by an ecclesiastical court*, and,

[12] Canons 1553, 1016, 1961; Roberti, *op. cit.*, I, 94.

[13] Canon 1553, § 2.

[14] Canon 1554; Wernz-Vidal, *op. cit.*, pp. 31 ff.

[15] Canon 87; Wernz-Vidal, *op. cit.*, p. 35, n. 29.

[16] Roberti, *op. cit.*, I, 80.

of course, the answer is that the *Holy Father necessarily enjoys such immunity.* Since the Pope has the highest legislative, administrative and judicial power in the Church, he has no earthly superior. Therefore, no ecclesiastical court has the power to subject him to judicial trial.[17]

Before proceeding to outline the various types of ecclesiastical tribunals and their procedure, I wish to state that I have deemed it advisable not to make any comparisons with civil law or use terms proper to civil law because to do so might lead to misconception and confusion. It is true that there are many similarities but, at the same time, many differences, and an analogous treatment might give you an incorrect picture, since civil law terms will have a specific and definite meaning for civil lawyers.

All courts—both civil and ecclesiastical—*must be competent* in order to try a case. The Code, in its general laws on competency, gives the following as the competent forums:

(1) *Domicile* or *quasi-domicile*: In ecclesiastical law a domicile is acquired by actual residence in a place with the intention of remaining permanently, or, otherwise, by ten years' residence, regardless of the person's intention. Similarly, a quasi-domicile is acquired by actual residence with the intention of remaining the greater part of the year, that is, more than six months, or, on the other hand, by residence of six months without regard to the intention of the person.[18] A respondent can be brought to trial before the court of the diocese in which he has his domicile, or quasi-domicile, even though the respondent be absent from that diocese.[19]

(2) *Location of the thing*—about which there is a controversy: If the suit is brought against the thing itself, that is, for ownership, heredity, possession, etc., the respondent can be cited to appear before the court of the diocese where the

[17] Canon 1556; Roberti, *op. cit.*, I 109, n. 57.

[18] Canon 92.

[19] Canon 1561.

thing is located.[20] Moreover, if it is an action to regain possession of property, or property rights, of which one has been wrongfully deprived, then the location of the property becomes the necessary forum for the action.[21]

(3) *Contract*: A party can be cited to appear before the court of the diocese in which the contract was entered or must be executed.[22]

(4) *Offense committed*: The accused party follows the *forum of the place of the crime,*[23] but, at the same time, the court of the respondent's domicile, or quasi-domicile, has concomitant jurisdiction.[24]

(5) *Connection or content of interrelated cases*: For example, a criminal action and an action for the damage caused by the crime. Both cases are to be tried by the same court unless a particular law prescribes otherwise. Such would be the case when the Code has designated a necessary forum for one of these matters.[25]

(6) *Prevention or priority of reception*: When two or more judges are equally competent, the right to try the case belongs to the court which first, legitimately, cited the respondent to appear.[26]

The Church has *various grades and types of courts.* Their relative importance and jurisdiction will be best understood if we start with the lowest and go to the highest or supreme court of the Church.

Every Bishop is obligated to constitute a court for his own diocese. It is known as the *Ordinary Tribunal of First Instance,* and the Bishop of the diocese is the Judge of the Court

[20] Canon 1564, Woywod, *A Practical Commentary of the Code of Canon Law* (5th ed., 2 vols., New York: J. F. Wagner, 1939), II, 201.

[21] Canon 1560, n. 1.

[22] Canon 1565.

[23] Canon 1566.

[24] Canon 1561.

[25] Canon 1567; Woywod, *op. cit.*, II, 202.

[26] Canon 1568.

of First Instance. He can exercise his judicial power directly himself, or he can delegate it to others.[27] Those whom he selects are known as the ministers of the tribunal, and they constitute the diocesan court.

The Bishop is obligated to appoint a priest as the *Officialis,* or *Chief Judge* of the diocesan court. The Code gives the Officialis ordinary power to pass judgment. By this we mean that his power proceeds from the law itself and belongs to him by reason of his office. He constitutes one tribunal with the Bishop of the diocese, that is to say, the Tribunal over which the Bishop or Officialis, as the case may be, presides, is one and the same tribunal. However, the Officialis cannot try cases which the Bishop reserves for himself. Assistants can be assigned to the diocesan Officialis, and they are known as *Vice-Officiales.*[28]

The other members of the court are the following:

(1) *The Judges*: They are called Synodal or Pro-Synodal Judges, accordingly as they are appointed at or outside of a diocesan Synod.[29]

(2) *The Notary,* who acts as secretary of the court.[30]

(3) *The Defender of the Bond,* who must take part in all cases involving the bond of marriage or ordination.[31]

(4) *The Promoter of Justice,* who takes part in contentious cases, where the Bishop believes the common good is at stake, and in criminal cases.[32]

(5) *The Courier* or messenger, who is to give official notice of judicial acts, such as to serve citation. He should be a lay person.[33]

[27] Canon 1572, § 1.

[28] Canons 1573, 197.

[29] Canons 1574, 387, 388.

[30] Canons 1585, 373, § 5.

[31] Canons 1586, 1587, 1588.

[32] Canon 1586.

[33] Canons 373, 1592, 1593.

(6) *The Apparitor*: He is also to be a lay person whose duty it is to execute the decrees and the sentence of the Judge, at his command.[34]

It is to be noted that, if the Defender of the Bond or the Promoter of Justice are not cited to appear and are *not actually present for cases* in which their presence is required, the acts of the cases are null and void.

Most cases are tried by a Collegiate Tribunal of three judges, and this holds for marriage annulment cases. However, as we shall see later, certain annulment cases can be tried by one judge. The Code allows the Bishop to assign more difficult or important cases to a Collegiate Tribunal of five judges.[35] The Officialis, or one of the Vice-Officiales, presides over the Collegiate Tribunal, directs procedure and decrees whatever is necessary for the administration of justice in the particular case. The tribunal must act as a collegiate body and pronounce sentence according to the majority vote.[36]

The second ecclesiastical court, in order of progression, is known as the *Ordinary Tribunal of Second Instance*. Recourse and appeal against the decrees and sentences of the Court of First Instance can be made to the Court of Second Instance, which must be constituted in the same manner, follow the same rules of procedure, and have the same number of judges for the individual case, as the Court of First Instance.[37] Although this is the ecclesiastical Court of Appeals, it is to be noted that it is the Ordinary Tribunal of the diocese which has the right to try, together with its own cases of first instance, those appeal cases from other courts which come under its competency. Therefore, it is not a court constituted simply to try cases on appeal. The rules on the competency of this court are the following:

[34] Canons 373, 1592, 1593.

[35] Canon 1576.

[36] Canon 1577.

[37] Canons 1595, 1596.

From the viewpoint of territory, the Church is divided into dioceses and provinces. The Archbishop of a province is called a Metropolitan, and the Bishops within the province are known as Suffragans.[38] The Court of Second Instance, for a Suffragan Bishop's court, is the court of his Metropolitan Archbishop. Thus the Court of New York is the Court of Appeal for all the suffragan dioceses in the New York Province. The court of an Archbishop appeals to a court selected, once and for all time, by an Archbishop of that province, with the approval of the Holy See. Thus the Court of New York has, as its appointed Court of Appeal, the Court of the Archdiocese of Philadelphia.[39]

The next highest court is the *Sacred Roman Rota.* This is one of the Ordinary Tribunals of the Holy See. The Rota hears appeal cases from courts of first instance. In addition, as the court of last instance, it hears cases previously tried by the Rota itself, or by other courts in second or further instance, whenever the law still makes allowance for further appeal. It also tries cases which the Holy Father has assigned to it.[40]

The highest court of the Catholic Church is the *Supreme Tribunal of the Apostolic Signatura.* This Tribunal settles disputes regarding competency between inferior tribunals. It also tries cases pertaining to the procedure and judgments of the Rota. The sentences or decisions of the Apostolic Signatura have effect, even though they do not contain the reasons in fact or in law.[41]

At this point we come to the question of the procedure to be followed in the trial of various types of cases. However, since the Fourth Book of the Code comprises 462 canons, it will be impossible for me to give a comprehensive synopsis of each. Therefore, I have decided to limit the remainder of this

[38] Canons 272, 274.

[39] Canon 1594, §§ 1-2.

[40] Canon 1599.

[41] Canon 1605.

discussion to the *procedure observed by diocesan courts in marriage annulment cases.* The Code is supplemented in this matter by the Instruction of the Sacred Congregation of the Sacraments of August 15, 1936,[42] as well as the decisions and responses of the Holy See since the publication of *The Code of Canon Law.*

When the case is introduced, the court must first determine its competency. The ordinary competent forums for marriage annulment cases are the diocese of contract and the diocese in which the Catholic respondent has his domicile or quasi-domicile, or if one of the parties is a non-Catholic the diocese in which the Catholic party has his domicile or quasi-domicile. If the case is introduced before the court of quasi-domicile, an investigation must be made as to the reason for this choice in order to avoid fraud.[43]

While the case is pending after the joining of the issues, change of domicile or quasi-domicile in no way revokes or suspends the competency of the tribunal, provided citation has been issued.[44] The tribunal itself is to pass on any exceptions lodged against its competency.

There are two kinds of procedure for marriage annulment cases—*solemn* or *formal procedure,* and *summary procedure.* We will first discuss the solemn process. For such trials a tribunal of three judges is required. The Officialis or one of the Vice-Officiales is to preside.[45] The Bishop can preside but, as a rule, does not.[46] The presence of the Defender of the Bond is always required in marriage cases.[47] The Promoter

[42] Instr. S. C. de Disc. Sacramentorum, "*Provida*"—*AAS,* XXVIII (1936), 313-61. Since the Articles of this Instruction will be constantly referred to in the balance of this paper, such reference will be designated as "Art.—" with the number.

[43] Art. 5.

[44] Canon 1725, nn. 2-5; Art. 8.

[45] Canon 1576, § 1, n. 1; Art. 13.

[46] Canons 1577-78; Art. 14.

[47] Art. 15.

of Justice must intervene when he himself attacks the validity of a marriage, or whenever it is necessary to protect the procedural law.[48]

The parties have the right to take exception to the personnel or competency of the court. The Judges, Defender of the Bond and the Promoter of Justice should not take part in cases wherein they would be related to either interested party by blood, marriage or some special form of interest such as guardianship, etc.[49] *Exceptions of suspicion against the personnel* of the court should ordinarily be proposed before the joining of the issues.[50] Such exceptions are to be decided by the tribunal as quickly as possible, and there is no place for appeal against this decision.[51]

An exception of *absolute incompetency* can be lodged at any time during the trial. A court, which is absolutely incompetent, must declare its incompetency, no matter how far the trial may have progressed.[52] There is place for an appeal to a higher court, within ten days, against the decision of a tribunal which either rejects or admits its own absolute incompetency.[53] On the other hand, an exception of *relative incompetency* must be proposed and decided before the joining of the issues.[54] The decision of the tribunal, in a question of relative incompetency, is final if it upholds its own competency. If the tribunal should declare itself incompetent there is place for an appeal, within ten days, to a higher court.

The court must next proceed to determine the *right of the petitioner to impugn the validity* of the marriage. The marriage annulment case of two unbaptized persons does not come

[48] Art. 16.

[49] Canon 1613, Art. 30.

[50] Canon 1628, § 1.

[51] Canon 1616; Art. 33.

[52] Canon 1628, § 2.

[53] Art. 29.

[54] Canon 1610, §§ 2-3; Art. 28.

within the jurisdiction of ecclesiastical courts.[55] The Holy See has stated that a non-Catholic, whether baptized or unbaptized, cannot act as a petitioner in a marriage annulment case. If there are special reasons for admitting non-Catholics as petitioners, recourse must be had in each case to the Congregation of the Holy Office. The reason for this exclusion is the fact that, although by baptism everyone becomes a member of the true Church of Christ with all the rights and obligations of a Christian, nevertheless, as far as rights are concerned, one who is not in communion with the true Church cannot exercise these rights.[56] This prohibition is commonly considered as only applying in cases requiring solemn trial, and not in summary or documentary cases.[57] Moreover, a non-Catholic still has the right to denounce the invalidity of the marriage to the Bishop or the Promoter of Justice, who is to decide whether the latter should officially attack the validity of the marriage.[58]

Aside from the question of religion, *the married parties* cannot impugn the validity of their marriage if they were the direct and malicious cause of the impediment or the nullity.[59] Of course this is based upon the principle that no one should profit by his own fraud and deceit. By impediment is meant not only those properly so-called, such as age, consanguinity, etc., but also those improperly so-called, such as force and fear and vitiations of consent by conditions, or intentions against the essential properties of matrimonial consent.[60] For ex-

[55] Canons 87, 1960; Roberti, *op. cit.*, I, 79, n. 44.

[56] Resp. S.S.C. Sancti Officii, 27 ian. 1928—*AAS, XX* (1928), 75; Canons 87, 1646.

[57] Gasparri, *Tractatus Canonicus de Matrimonio* (ed. nova, 2 vols., Romae: Typis Polyglottis Vaticanis, 1932), II, p. 293, n. 1260.

[58] Canon 1971, § 2; Art. 37-41.

[59] Canon 1971, § 1; Pont. Com., 27 iul. 1942—*AAS,* XXXIV (1942), 241; Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: Bruce, 1938), p. 89; Reh, "Guilt of the Plaintiff in a Marriage Case"—THE JURIST, III (1943), 404 ff.

[60] Pont. Com., 12 mart. 1929—*AAS,* XXI (1929), 171.

ample, abduction is an invalidating impediment.[61] If a man abducted a woman for the purpose of marriage and kept her in his power, knowing that it was wrong to marry in those circumstances without revealing the facts, then he is the direct and deceitful cause of the impediment and cannot impugn his marriage.

Despite the fact that a person is incapable of accusing his marriage, he may still be able to get relief since he has the right to denounce the nullity of his marriage to the Bishop or the Promoter of Justice.[62]

The *Promoter of Justice* can, *ex-officio,* and without any previous denunciation, impugn a marriage on the basis of impediments which are, by their nature, public. In other cases where denunciation is made by one who is incapable of impugning his marriage, the Promoter cannot attack the marriage unless the three following conditions concur:

(1) It is a question of an impediment which has become public and there can be no serious doubt about its existence.

(2) The public good, namely, the removal of scandal, in the judgment of the Ordinary, requires it.

(3) It is impossible even upon the cessation of the impediment to affect a proper contract of marriage between the parties.

It is to be noted that *no one* can attack the validity of a marriage which was not impugned during the lifetime of both parties. After the death of one of the parties, the presumption for its validity is so strong that no proof against this presumption is admitted unless the question should arise incidentally.[63]

Although a party can bring suit or defend it personally, it is advisable that he have an *advocate* chosen by himself or designated by the judge. The respondent who contests the case may appoint an advocate, even though the Defender of

[61] Canon 1074.

[62] Canon 1971, § 2; Art. 35, § 2.

[63] Canon 1972; Art. 42.

the Bond is obliged to protect the marriage bond.[64] The advocate must take care of the legal defense of his client. *Procurators* with the power of attorney can also be appointed.

The Procurator and the Advocate should be Catholics. Procurators must always be appointed by the party they represent. Advocates, however, may be appointed either by the judge or the party. They receive authority to act from the written mandate of the party, which is filed with the case.[65] However, such advocates must be well-versed in Canon Law and have the approval of the Bishop of the Diocese. As a matter of fact, I am not aware of any approved lay canonists practicing before ecclesiastical courts in this country. At the command of the judge, advocates must offer their services gratuitously.[66] In the New York Tribunal the Advocates—all of whom are priests—never request any fees or compensation, even when directly engaged by the party.

The *case is introduced* before the court *through a written petition* which outlines the facts and proof and formally requests a declaration of nullity.[67] It should be signed by the petitioner or his procurator.[68] Those who, for any reason, are unable to write can make an oral petition before the court which is taken down by the notary. The petitioner signs his cross and the secretary notarizes the document, indicating the significance of the cross. The petition should be accompanied by the mandates of the procurator and advocate.

If the consent of one of the married parties would be sufficient to remove the impediment or defect, the Bishop should try to effect a revalidation of the marriage.[69] In the event of *final rejection of the petition*, the petitioner can take recourse, within ten days, to a higher court which should decide the

[64] Art. 43, §§ 1, 4.

[65] Canon 1656, § 1; Canon 1657; Arts. 47, § 1, 48-49.

[66] Art. 53.

[67] Canon 1706; Art. 55.

[68] Canon 1708; Art. 57.

[69] Art. 65.

issue as soon as possible after hearing the petitioner and the Defender of the Bond.[70] No appeal is allowed against a confirming decision,[71] but if the higher court reverses the first court and accepts the petition the case must be remanded to the first court for trial.[72]

Upon acceptance of the petition, the question of court expenses should be discussed with the petitioner.[73] As a matter of fact, they are nominal. The petitioner can ask for a reduction or the gratuitous services of the court. This is readily granted if the party cannot meet the obligation. The Church is very jealous of the integrity of its courts and their personnel. Yet, because of the fact that you hear only of the cases decided by the Church which involve prominent people, there is perhaps a misunderstanding in regard to this on the part of the average individual. Reports of the Sacred Roman Rota help to clarify this issue. The official periodical of the Holy See, the *Acta Apostolicae Sedis,* in the volume for 1939 reports on cases reviewed by the Rota during the year 1938,[74] which would be a typical pre-war year. An analytical break-down of this data reveals that the Sacred Roman Rota passed on seventy marriage annulment cases and, of these, thirty-eight cases received gratuitous service. Favorable decisions were granted in that year to twenty-six appellants, nineteen of whom had their cases tried without expense to themselves. On the other hand, forty-four negative decisions were rendered, and twenty-five appellants receiving negative decisions paid the court's assessment. To clarify what has just been said, let us resort to percentages. Fifty-four per cent. of the total number of cases before the Rota during the year 1938 were granted gratuitous service; 73 per cent. of the affirmative decisions were granted

[70] Canon 1709, § 3.

[71] Canon 1880, n. 7; Art. 66, § 1.

[72] Art. 66, § 2.

[73] Doheny, *op. cit.*, p. 382.

[74] *AAS*, XXXI (1939), 189 ff.

to appellants whose cases were tried without expense; 57 per cent. of the negative decisions were issued to appellants who actually paid the court's expenses.

The court next proceeds to cite the *plaintiff, respondent,* and *Defender of the Bond* to appear for the *joining of the issues.* When the Promoter of Justice impugns the marriage, both parties are cited as defendants. Citation is made either by personal service of the courier or the more common custom of registered mail with return receipt requested.[75] Every citation is peremptory and, if refused, the person is considered as legitimately cited.[76] The judge may repeat the citation if he deems it advisable.[77]

In marriage annulment cases the juridical effects of the legitimate citation of the respondent, or the voluntary appearance of both parties in court, are the following:

(1) The case ceases to be a "*res integra*", that is, an intact matter. The case is then before the court; the trial has begun, and the matter involved in the case is no longer a private affair but one in which the public authority of the Church has become interested.

(2) The case becomes *proper to the judge or court* where the action has begun. All other courts which might also have been competent are excluded from judging the case in first instance.

(3) The *jurisdiction of a delegated judge* is rendered firm, so that his jurisdiction does not expire with the loss of jurisdiction on the part of the one who delegated him.

(4) The *case is then pending* before the court, and immediately the principle of law applies—that nothing may be changed while the litigation is pending.[78]

[75] Canon 1719; Art. 79.

[76] Canon 1718; Art. 82.

[77] Canon 1714; Art. 86.

[78] Canon 1725.

The joining of the issues is the formal answer of the respondent to the petition.[79] It definitizes the matter for judgment and the doubt to be settled by the trial.

A respondent who fails to appear or make answer is declared contumacious, and the court proceeds upon the motion of the plaintiff to define the doubt, which is made known to the respondent.[80] On the other hand, if the petitioner fails to appear he is to be cited again with the threat of contumacy. If he fails to appear after the second citation, the case is then declared abandoned.[81]

The burden of proof rests upon the one who attacks the validity of the marriage.[82] It is to be noted that notorious facts and things presumed by law do not require proof.[83]

It is the duty of the Defender of the Marriage Bond to be present at the examination of parties, witnesses and experts, and he must therefore be cited to appear at all such sessions. Both the Defender and the advocate submit written questionnaires, and the questions are proposed by the Presiding Judge. The judges of the court can ask additional questions to clarify an issue. Interpreters are to be used whenever necessary.[84]

All persons who testify are instructed about the sanctity of an oath, and the gravity of perjury, before taking the *oath.* Moreover, the identity of the person must be established.[85]

The *petitioner* is to be interrogated first and then the *respondent.* Their testimony in trial is not admissible as proof against the validity of the marriage.[86] Statements or admis-

[79] Canon 1726.

[80] Art. 89-90.

[81] Canons 1849-50, § 1; Art. 90.

[82] Canons 1748, § 1; Art. 94.

[83] Canons 2197, 1747; Art. 93.

[84] Canons 1776-77, 1968-69; Art. 70-71, 103, 108.

[85] Art. 97.

[86] Art. 117.

sions to that effect, made by a consort before the marriage or at an unsuspected time after the marriage, are to be estimated by the court as to their corroborative value.[87]

Certain *witnesses* are not qualified to testify. Thus, persons below the age of puberty, or the feeble-minded, are excluded as unfit. Convicted perjurors, and public and implacable enemies of the party, etc., are excluded as suspect. Among those classified as incapable because of the source of their knowledge are priests in regard to knowledge received in sacramental confession, even if released from the obligation of the seal.[88] All others who have the obligation of professional secrecy, such as physicians and lawyers, are exempted unless released by the persons concerned.[89] In marriage cases relatives are acceptable as witneses.[90]

In impotency and insanity cases the opinions of *experts* are always necesary but, in other cases, the judges are to determine its advisability or necessity.[91] Doctors who have previously examined a party as a private physician are excluded as experts in insanity or impotency cases. They should, however, be brought in as witnesses.[92]

Experts take an oath of office and secrecy, and must perform their examination in accordance with the instructions of the judge. Their examinations must be made separately and they are to file a report and testify. The court is not obliged to follow their opinions, even when concordant. In its final decision the court must give the reasons why the conclusions of the experts are either admitted or rejected.[93]

Proof by *documentary evidence*, both public and private, is admitted in every type of trial. Public documents are those

[87] Art. 116.

[88] Canon 1757; Art. 119.

[89] Art. 121.

[90] Canon 1974; Art. 122.

[91] Canon 1792, 1976, 1982; Art. 139-40.

[92] Canon 1978, 1982; Art. 143.

[93] Canons 1779, § 2; 1802, 1804, 1978, 1982; Art. 143, 146-152.

which are recognized as such by the law of the locality. Documents drawn up by private individuals are considered only as private documents.[94] In order that documents have probative value, they must be originals or authenticated copies.

The court can also accept *presumptions* as a means of proof. A presumption is a probable conjecture about an uncertain matter. A presumption established by law is called a *legal presumption.* If the law states that no proof can be admitted against the presumption, then it is called a *legal presumption which has the effect of law.*[95] A *human presumption* is a conjecture not expressed in any particular law, although generally approved by the law, so that a judge or any other person, because of the very nature and circumstances in regard to the fact, can hold something to be true. If one has a presumption of law in his favor, the burden of proof falls on his adversary. There is a presumption known as "the Queen of all Presumptions" because it is the source from which others are drawn. This presumption is stated as "Whatever has been done is presumed to have been done correctly."[96] Of course, marriage enjoys the favor of law and, in doubt, its validity must be upheld until the contrary is proved.[97]

After all proofs have been submitted, a Decree of *Publication* is issued and the parties, the advocates, and the Defender of the Bond have the right to inspect all evidence and records. In the Decree of Publication the judge specifies a period within which newly discovered evidence of a material nature may be submitted. The Decree of *Conclusion* is then issued and both the advocate and Defender submit *briefs,* each having the right of rebuttal.[98] The case then goes to the judges for review and decision.

[94] Canons 1812, 1813; Art. 155-56.

[95] Canons 1825, 1827; Art. 170.

[96] Reiffenstuel, *Ius Canonicum Universum* (5 vols. in 7, Parisiis, 1864-1882), II, T. XXIII, nn. 91-2.

[97] Canon 1014.

[98] Canons 1858-1862, 1984, § 2; Art. 176-77.

Each judge files his sealed written *opinion* and then a collegiate session is held. The majority vote settles the issue, and inviolable secrecy must be maintained in regard to their discussion and vote. A judge has the right to recede from his opinion during this session. The judge-reporter who has charge of the instruction of the case is to draw up the sentence, which the three judges sign.[99]

The Sentence itself must always begin with the invocation of the Divine Name. It should give in order the personnel of the Tribunal; and state who the petitioner, defendant, procurator and advocate are, with names and domiciles properly indicated; the Promoter of Justice and Defender of the Bond, if they took part in the trial; the facts of the case; the basis alleged; the doubt proposed at the joining of the issues; the law involved; the application of the law to the facts; the reasons for the conclusions; the decision; assess expenses and decree method of publication.[100]

Definitive Sentences are published in three ways: (1) by a solemn reading to the parties by a judge; (2) a private reading at the Chancery by the parties; or, (3) sending it by registered mail. The Defender of the Bond and the Promoter of Justice are also to be informed of the decision.[101]

If the Sentence is invalid for any reason a *complaint of nullity* may be lodged against it. Defects in the format of the sentence are remediable, but defects in regard to the competency of the Tribunal or the parties, etc., are irremediable.[102]

The Defender of the Bond has the obligation *to appeal* a decision against the validity of the marriage.[103] If the Tribunal holds that the invalidity of the marriage has not been proved, the petitioner can appeal to a higher court.[104]

[99] Art. 180.

[100] Canons 1873, 1874.

[101] Canon 1877; Art. 204.

[102] Canon 1892-94; Art. 207-09.

[103] Canon 1986.

[104] Canon 1879.

Notice of appeal must be filed in the first court within ten days and the appeal prosecuted before the Court of Appeal within a month. The Court of Appeal follows the same procedure as the Court of First Instance.

Two confirming decisions, upholding the validity of the marriage, precludes any further appeal without new evidence. If there are two confirming decisions for the nullity of the marriage, the Defender of the Bond may still appeal to a higher Court. If the Court of Appeal reverses the first court, the case must go to a higher court, and this is usually the Sacred Roman Rota.[105]

The Code makes provision for a *Summary Trial* before one judge in cases where the existence of certain impediments can be proved by authentic documents which are not open to contradiction. There must be equal certitude that no dispensation from this impediment was given. The Defender of the Bond must intervene in these cases, but the solemnities required in a trial before a tribunal of judges can be omitted.[106] The Officialis prepares the case but the Bishop himself passes judgment. If the required certainty is not present, the case is to be assigned to a Collegiate Tribunal for solemn trial.[107] The Defender of the Bond has the right to appeal a summary case, but not the obligation, as he would have in solemn trial. However, if the Defender feels that the existence of the impediment is not certain, or that a dispensation was granted properly for the same, he is obliged to appeal to the diocesan court of second instance.[178] The same right belongs also to both the Promoter of Justice, if he intervened in the summary case, and the aggrieved party.[109]

In the Court of Second Instance the Judge, after receiving the comments of the Defender of the Bond of his own Tri-

105 Canons 1879, 1881-83, 1987; Art. 212.

106 Canon 1990.

107 Article 227, § 2.

108 Canon 1991; Art. 229, § 1.

109 Canon 1880; Art. 229, § 2.

bunal, is to decide in Summary Process whether the Sentence of the Court of First Instance is to be confirmed or the case submitted to solemn trial. In the latter event the case is remanded to the Court of First Instance.[110]

The final type of procedure we are to consider is one of a purely administrative character.[111] It refers to ceremonies of marriage entered into before a civil official or a non-Catholic minister by Catholics who are bound to the form of solemnization which prescribes the presence of a competent priest and two witnesses. Objectively, such ceremonies do not beget the bond of marriage for Catholics but, in the particular case, it belongs to the Church to determine whether a person who was baptized in the Catholic Church was actually bound to the canonical form.

Before such a person can contract marriage in the Catholic Church with another spouse, it is necessary for him to submit the case to the Chancery Office of the diocese where the marriage is to take place, unless the Bishop has authorized the pastor to investigate and pass upon the case.

If it appears, after the investigation has been completed, that this ceremony might have been a valid, binding marriage for the Catholic party concerned, the case must be submitted to a tribunal of three judges for solemn trial.[112]

It has been said that President Taft considered the Fourth Book of the Code to be the finest codification of procedural law he had ever seen. Eminent canonists have written volumes on this Book, and it is apparent that this paper, with so many limitations as to the matter and form, in no way does justice to the procedural law of the Church. I hope, however, that it may have created some interest in this wonderful instrument of justice which the Church has given to its Courts for the purpose of accomplishing its primary end—the Salvation of Souls.

[110] Canon 1992; Art. 230.

[111] Canon 1019, 1094; Art. 231.

[112] Art. 231.

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PENAL LEGISLATION IN THE CODE OF CANON LAW*

Introduction

IN order to attain its purpose completely, i. e., to be in truth a body of *universal* ecclesiastical law, *The Code of Canon Law* must contain all the laws necessary to secure and protect the juridico-social order of the Church. This end or purpose is directly and primarily served by the legislation contained in the Second and Third Books of the Code; for it is by this legislation that the complete constitution and life of the Church are ordained. Here are set up and regulated both the *persons* who make up and rule the Church and the *things,* the institutions and actions, which belong to the Church as means suitable and necessary for the attainment of its proper end.

These laws, however, defining all the rights and duties of all the persons in the Church, not rarely will become useless or ineffective in practice unless respect for them is protected and demanded by the ecclesiastical authority regardless of any supervening obstacle. Practically speaking, there may, and at times do, exist two two general obstacles to the observance and fulfillment of the laws set up by ecclesiastical authority. These are (1) *doubts* about certain laws and controversies about their proper practical application; and (2) the disobedience or resistance of unwilling subjects. Obviously, it is the right and duty of the competent legislator to make proper and effective provision for the settlement or removal of these obstacles. Such provision has been made by the ecclesiastical legislator in the Fourth and Fifth Books of the Code. In the Fourth Book are prescribed those norms by which the doubts and con-

* Lecture delivered February 28, 1944, under the auspices of the Guild of Catholic Lawyers in New York City by Rev. John M. Costello, J.C.D., Judge of the Ecclesiastical Tribunal of the Archdiocese of New York.

troversies are to be defined, and by which the exercise of all judicial powers, civil and criminal, is to be conducted. The Fifth Book of the Code contains those norms according to which the coercive power of the church is to be exercised on unwilling and delinquent subjects. It is the Fifth Book of the Code which is the subject of the present paper.

It would be useful at the very outset to set forth the principles of penal or criminal law which determine the juridical title or right of any public authority to coercive or punitive power, and the object, purpose and extent of that power. Of necessity we must limit ourselves to these few statements. According to the so-called juridical theory of penal law, defended by many Catholic authorities and many eminent secular criminalists, the *basis* or *right* of society to punish is the necessity of protecting and conserving the social juridical order and of restoring it when violated by the criminal abuse of human liberty. In this theory, justice is the absolute cause or reason for punishment and utility is the relative cause or reason for punishment; since lacking justice, the reason for any punishment whatsoever would be lacking, and lacking utility, the reason for any human punishment would be lacking. The object of the punitive power is the violation of a law that disturbs the *social order;* not the violation of every law, therefore, is punishable, but only of that law which creates social disorder, thereby undermining public confidence, security and tranquillity. The *end* or *purpose* of social punishment is the restoration of public tranquillity disturbed by a criminal action. The measure or extent of social punishment is the loss or disorder caused by the crime.[1]

It is important here also to make some application of these general principles with regard to the nature and purpose of punitive power in the ecclesiastical society.

The Church was instituted by Christ as a *visible,* external, juridically perfect and absolutely necessary society for this

[1] Cf. Latini, *Juris criminalis philosophici summa lineamenta* (Taurini, 1924), (an excellent study of the philosophical principles of penal law); Roberti, *De delictis et poenis,* I, nn. 20-37.

supernatural and spiritual end, viz. that *in it* and *through it exclusively,* all men may accomplish their sanctification and thus attain to their eternal salvation. This end of the Church, although *in se one,* yet, by reason of the manner in which it must be secured, is actually *twofold;* or perhaps more rightly, is to be attained in a twofold sphere.

As any other perfect society, the Church is concerned *directly* and *immediately* with the *external* and *public* spiritual good, common to ecclesiastical society itself as such. *As a public perfect society,* it does not directly pursue the sanctification of each member as an individual, but the sanctification of all members inasmuch as they are a part of the ecclesiastical society, and hence inasmuch as they are in social communication with one another and with the society. In this respect the Church directs and regulates the social relations of the members, in this way procuring for them a certain external status in society which will further the internal sanctification of all.

But at the same time and especially *as an altogether special perfect spiritual society* ordained by reason of its entirely special character to secure the eternal good of its members, the Church *directly* and *immediately* must promote the sanctification of its individual members by seeing to it that each one rightly orientates himself towards God and thus attains to his eternal destiny.

In order to accomplish this twofold end the Church has received from Christ, its founder, an adequate social power, i. e., besides the power of teaching and sanctifying, the power also of ruling and governing—a power which includes the power to make laws, the power to judge controversies and the power to punish recalcitrant subjects. When this power of ruling or of jurisdiction is ordained *directly* for the *internal spiritual good* of the individual faithful, it is called jurisdiction of the internal forum and also vicarious jurisdiction; the former since it is exercised in the internal forum, the forum of God, and the latter since it is exercised in the Name of God, to Whom belongs *per se* the direct sanctification of souls. When this

power of ruling or of jurisdiction is ordained *directly* for the *public good* of external society it is called jurisdiction of the external forum and also *proper* jurisdiction inasmuch as it is exercised by the Church in the *external forum* and *in its own name.*

When we speak here of the nature and basis of the coercive power of the Church, we speak of the latter not of the former. As far as concerns the individual faithful and with regard to their sins of omission or commission before God and the reason they must give before the Church in the internal forum, the coercive (vicarious) power of the Church is founded clearly in the necessity of punishment in order that the sinner satisfy divine justice violated by sin and thus return to the way of sanctification deserted by sin. In this case, the *cause* of the punishment or penance is the restoration, partial at least, of the moral order and the amendment of the sinner; and the extent or measure of the penance is in proportion to the gravity of the offense against God, plus the damage caused by sin. Here, however, we are concerned with the title or basis of the ecclesiastical coercive or punitive power, properly speaking, viz., that which is exercised on delinquent subjects inasmuch as they have violated the external social order of the Church. According to the common teaching the proximate foundation or basis of the social punitive power in the Church is the absolute necessity of protecting the juridical ecclesiastical order from criminal abuse, and of restoring this order when it has been violated. Hence the *proximate cause* of ecclesiastical punishment is the social *injustice* of the criminal action or the deviation of the criminal action from the juridical order of the Church. The *primary and intrinsic end* of ecclesiastical punishment is the restoration of the juridical order disturbed by the crime. The proper *measure* or *extent* of ecclesiastical punishment is the social damage culpably inflicted on ecclesiastical society by the crime.[2]

[2] Cf. Roberti, *o. c.*, n. 34; Michiels, *De delictis et poenis* (Lublin, 1934), I, 18-22; Lega, *De delictis et poenis* (Romae, 1910), n. 11-17; Wernz, *Jus Decretalium,* Vol. VI (Prati 1913), n. 14.

With these preliminary but necessary remarks we come to the present penal law of the Church.

In the exercise of that part of public power, which before all others is most odious to subjects, for whose common good public power was ordained, it is most expedient and, indeed, only just and humane to expect that the subjects should be able to know certainly and easily what are the facts or deeds on account of which they can be punished. It is equally expedient that the superiors who must apply the penal law should be guided in the exercise of power by clear and definite laws and legal principles. The power of *one man* over another which extends itself to punishing him and depriving him of rights belonging to him seems so exorbitant that it is absolutely necessary that it should rest on the clearest law, free from all controversies and disputes. In the exercise of such great power the principle should prevail: No one can punish me and strip me of lawful rights unless he has proved his power and his right with unassailable reason and justice. Following this principle of natural reason, the Church has striven to present her penal legislation in a clear, definite and systematic way.

The Fifth Book of the Code, which contains the entire present penal law of the Church, is divided into three parts which are variously subdivided. The first part deals with crimes in general; the second with punishments in general; and the third lists the various crimes and the particular punishments attached to them. The first two parts constitute the fundamental penal law of the Church; the third part contains the substantive, or positive, penal law.

In order to present a fair outline of this penal law, the treatment necessarily must be largely descriptive.

Part I. Crimes

In the first and briefest part of the Fifth Book the Code defines the intrinsic nature of an ecclesiastical crime, lays down definite, though general, rules determining the specific

gravity and malice of crimes, and states briefly the general effects of crimes.

The very first canon, or law, of the Fifth Book of the Code defines an ecclesiastical crime as "The external and morally imputable violation of a law to which a penal sanction has been attached." [3] According to this, the official definition, three simultaneously coexisting elements go into the make-up of every and any ecclesiastical crime. These constituent and necessary elements are generally called the objective, the subjective, and the legal element.

The objective element is the *external violation of a law.* Although it need not be public, yet the violation of the law must be external, i. e., perceptible to the senses. Thus, in order to commit the crime of heresy it is not enough merely to deny or doubt internally a dogma of faith; it is necessary that the denial or doubt be manifested externally, i. e., by words, by writing, etc.

The subjective element is the *moral imputability for the violation of a law—the criminal intent.* Imputability is that quality of an action in virtue of which it may be ascribed to a certain person as its responsible master; in other words, an imputable action is one performed by a man who knew, or should have known, what he was doing, and who acted without any external compulsion.

The legal element of a crime is the violation of a *law to which a penal sanction has been attached.* Not every sin or violation of a law is an ecclesiastical crime. Generally speaking only the violation of a law to which a penalty for infraction has been attached is a crime punishable by the public ecclesiastical authority. Although this principle "nullum crimen sine lege"—no crime without a law—was a principle of the ancient Roman law and is a principle of most modern penal legislation, it was adopted by the ecclesiastical legislator for the first time as a general principle of law only at the time of the publication of the Code.[4] We say as a general principle

[3] Canon 2195.

[4] Cf. Roberti, *o. c.*, n. 38.

since in our law this principle does not operate in its most rigorous and absolute sense, viz., in a sense that a penalty may never be inflicted for a violation of a law unless a penal sanction has been attached to that law. On the contrary, the Code has set up a general modification of that principle. It is stated thus: "Although the law has no penal sanction attached to it, yet a superior can inflict a penalty for its violation even without a previous threat of punishment, if the scandal given or the special gravity of the violation justifies it." [5] Such elasticity in the application of the general principle "No crime without a law" is, we believe, fully justified. Society is thus protected against unforeseen antijuridical actions which may be especially scandalous or unusually damaging; and the individual receives a general warning against actions that are particularly malicious or scandalous, and is punished only when these circumstances are verified.

Although in most penal codes crimes are distinguished by reason of their gravity, e. g., into felonies and misdemeanors, no distinction of crimes in this respect is found in the Code. In our law every violation of a penal law, regardless of its nature or gravity, is called a crime. The only divisions of crime in our penal law are those which distinguish crimes by reason of their publicity and by reason of the social authority to which they are subject. By reason of their publicity, crimes are divided into public, notorious, and occult. A crime is public if it has been already divulged, i. e., if it is known to the greater part of the community; or if it has happened in such circumstances that it can and should be prudently judged that it will easily be divulged. A crime may be notorious by notoriety of law or by notoriety of fact. It is notorious in the former sense after a final judicial sentence rendered by a competent judge, or after a judicial confession of guilt. It is notorious in the latter sense if it is publicly known and was committed in such circumstances that it cannot be concealed by any subterfuge or excused by any interpretation of law. A

[5] Canon 2222, § 1.

crime is occult which is not public.[6] The importance of this distinction rests in the fact that only public and notorious crimes are subject to criminal trial.[7]

By reason of the social authority to which they are subject, crimes are divided into ecclesiastical crimes, civil crimes and mixed crimes, according as they violate either or both laws. In the respective cases they are punished by either law or by both.[8]

It seems evident because of their factual nature that the verification of the existence and character of the objective and legal elements of a crime ordinarily will present no difficulty. It seems equally evident from its nature that not rarely the determination of the subjective element, viz., imputability, at least in regard to degree, will perplex the mind of the judge. A delinquent may be entirely guiltless, or he may be responsible for his actions in different ways and in various degrees; he may have acted through malice or through ignorance or through carelessness. To aid the judge in exercising his power in this difficult matter, the Code has devoted a complete section of this part to an exposition of the legal principles determining the degree of imputability in the various circumstances that usually accompany human action.

As far as concerns the method of proposing the legal principles determining criminal imputability that of the Code is, substantially, the *mixed* system adopted by most modern civil codes. In this system, there are successively set forth principles affirming the existence of different degrees of imputability, and principles defining the circumstances or causes which increase, decrease, or exclude criminal imputability in a given case. It may be noted here that juridical or criminal imputability is nothing more or less than a specific case of moral culpability, and that it is ruled by the same theoretical principles as moral culpability.[9]

[6] Canon 2197.

[7] Canon 1933.

[8] Canon 2198.

[9] Cf. Michiels, *o. c.*, p. 98-100.

The first general principle concerning imputability enunciated by the Code is the following: "The imputability of a crime depends upon the malice or criminal intent (*dolus*) of the delinquent, or on his culpability (*culpa*) by reason of his ignorance of the law violated, or of his failure to use the proper diligence." [10] It follows from this principle that there are two sources or roots of imputability in our law: criminal intent and culpability. Either one suffices to constitute criminal imputability. Criminal intent (*dolus*) is defined by the Code as the "deliberate will or intention of violating the law." [11] Stated in another way, it consists in the positive intention, freely and deliberately elicited by a person, of placing or performing an external action which is contrary to the law. Culpability (*culpa*) is defined by the Code as ignorance (gravely culpable) of the law violated, or the failure (gravely culpable) to use the proper diligence (Canon 2199).[12]

The second general principle enunciated by the Code is stated thus: "When the external violation of the law has taken place, criminal intent is presumed in the external forum until the contrary is proved." [13] The reason for this principle is plain and in complete agreement with human experience. Obviously the public-social authority must proceed in accordance with what ordinarily and usually happens. But ordinarily every person of sound mind is accustomed to act reasonably and freely, knowing and willing whatever he does. Hence a violation of a law is presumed rightly to have been done freely and deliberately, until it has been proved from concrete facts and circumstances that the violation of the law was free from all guilt or was performed only with some fault.[14]

This regulation is followed by a statement of principles outlining the effect of various causes on the imputability of a criminal action. Although this section of the law would pro-

[10] Canon 2199.

[11] Canon 2200, § 1.

[92] Canon 2199.

[13] Canon 2200, § 2.

[14] Cf. Michiels, *o. c.*, p. 113.

vide an interesting and very practical study in itself, it is possible here only to state the principles.[15]

The following causes take away all imputability—

a) Lack of actual use of reason, e. g., in infants and in the insane.

b) Involuntary drunkenness and similar mental disturbances, when they take away all use of reason.

c) Invincible ignorance.

d) An accidental set of circumstances which could not be foreseen; or, if foreseen, could not be avoided.

e) Physical force.

f) Grave fear, where there is question of merely ecclesiastical laws.

g) Impulse of passion, which totally takes away reason.

h) Legitimate self-defense against an unjust aggressor, provided due moderation is used.

The following causes diminish imputability—

a) Vincible or culpable ignorance of the law or of the penalty.

b) Voluntary drunkenness, except in cases where the drunkenness was sought precisely for the purpose of committing or excusing the crime.

c) Failure to use the proper diligence.

d) Minor age (in Canon Law a person under twenty-one years of age).

e) Lack of moderation in cases of legitimate self-defense.

f) Impulse of passion, which partially takes away the use of reason.

g) Grave fear, in cases where the action is intrinsically evil or involves contempt of the faith or of ecclesiastical authority, or works to the detriment of souls.

[15] These principles are contained in Canons 2201-2208.

The following causes increase imputability—

a) Passion voluntarily and deliberately aroused or fostered.

b) The greater dignity of the person who commits a crime, or against whom a crime is committed.

c) Abuse of office or authority for the purpose of committing a crime.

d) Second offense (*recidivus*).

Co-operation—Conspiracy In Crime

It happens not infrequently that many persons will participate or co-operate in the commission of a crime. Some crimes of their very nature demand the active co-operation of two or more persons, e. g., duelling. In other crimes, which of their nature may be committed by one person, actually many persons may participate or co-operate. In all these cases it is important to determine, at least in general, the various degrees of criminal and imputable co-operation, and in what measure the same crime can and should be criminally imputed to each accomplice, conspirator, or co-operator. Canon 2209 itself contains the simplest and, at the same time, the most complete statement of the present legislation on this matter.

CANON 2209

§ 1 "Those who plot to commit a crime and at the same time co-operate physically in the commission of the crime, are all considered to be guilty in the same degree—unless circumstances aggravate or lessen the culpability of one or another."

§ 2 "In a crime which, by its very nature, requires an accomplice, each one is guilty to the same degree, unless the contrary appears from the circumstances."

§ 3 "Not only the principal author of the crime but also those who induce another to commit the crime, or who co-operate in any way in the commission of the crime, are guilty in the same degree as the actual perpetrator of the crime, if the crime could not have been committed without their help."

§ 4 "If their co-operation only facilitated the commission of the crime which, however, would have been committed without their help, they incur a lesser degree of guilt."

§ 5 "A person who ceased co-operation in the crime by complete and timely withdrawal of his influence or participation is freed from all guilt even though the perpetrator of the crime, for his own reasons, nevertheless committed the crime; if he did not fully withdraw his influence, his withdrawal lessens but does not entirely cancel his guilt."

§ 6 "Who co-operates in a crime only by neglecting his duty is guilty in proportion to the obligation he had in virtue of his office to prevent the offense."

§ 7 "Praise of the crime committed, sharing in its spoils, hiding or harboring the criminal, and all other actions performed after the commission of the crime, may constitute crimes in themselves if these very actions are forbidden in law under penalty; but unless a person had made an agreement to perform these actions before the commission of a crime, he does not incur the penalty for this crime."

ATTEMPTED CRIMES

In order that a crime actually be committed, it is required that the antijuridical action be crowned by actual effect, i. e., that it be fully consummated. It can and does happen that for one reason or another a criminal action may not be fully executed. In this case is verified what is commonly called an imperfect or incomplete crime, and what is called in law an attempted crime. In Roman law only completely consummated crimes were punished. Although in the early ecclesiastical law there may be found some texts of law in which penalties were prescribed for unsuccessful attempts at crime, up to the time of the Code no general canonical discipline or even general theory regarding attempted crimes was proposed.[16] In most modern civil codes the criminal imputability of an attempted crime is almost universally admitted. Keeping up with the march of crime, the Church for the first time in its

[16] Cf. Roberti, *o. c.*, n. 169.

history has now officially issued its own legislation concerning the character and imputability of attempted ecclesiastical crimes.

The Code recognizes two species of incomplete crimes, viz. the attempted crime and the frustrated crime. He is guilty of an *attempted crime* who has committed an act which of its nature, leads to the execution of a crime, but which is not completed either because he changed his mind or because the means used were insufficient.[17] He is guilty of a *frustrated crime* who has performed all those acts which, of their nature, are sufficient to complete the crime, but which do not accomplish their effect only because of some reason other than the will or intention of the delinquent.[18]

With regard to the matter of imputability, the Code decrees, and this appears obvious, that the frustrated crime is more culpable than the attempted crime; and that a person who voluntarily desisted from carrying out a crime already begun is free from all imputability, if no injury was caused to any one and no scandal was given by the attempt.[19] It may be added here that, when frustrated and attempted crimes are not punished by law as distinct crimes in themselves, they may be punished in accordance with their gravity at the discretion of the judge.[20]

JURIDICAL EFFECTS OF CRIMES

As a rule a twofold loss is inflicted by an ecclesiastical crime —a loss to the ecclesiastical society itself and a loss to a definite person. Since, according to the rules of justice, every loss should be repaired, it follows that there arises from the commission of a crime a twofold obligation on the part of a delinquent—one towards the ecclesiastical society itself, and the other towards the person or persons whose individual rights or possessions were violated by the crime. As part of its offi-

[17] Canon 2212, § 1.

[18] Canon 2212, § 2.

[19] Canon 2213.

[20] Canon 2235.

cial efforts to prove that crime does not pay, the Code decrees that the commission of a crime gives rise to two judicial actions, viz. a penal or criminal action for the punishment of the delinquent and of the crime, and a contentious action for the reparation of damages.[21] Each action must be tried in accordance with the rules for criminal and contentious trials outlined in the Fourth Book of the Code. However, because of the connection of the actions, the contentious action, at the request of the injured party, may be tried by the same judge before whom the criminal action was tried.[22] Thus ends this section of the newest criminal legislation of the Church.

Part II. Penalties

The natural law itself teaches that as those who observe the law should be properly rewarded, so also those who violate the law should be justly punished. Punishment and crime may be said to be, in a very real sense, correlative concepts. The crime is the bane, the penalty the antidote. Accordingly, every public society, from the very beginning has constituted certain penalties against those guilty of crimes which seriously disturb the social order.

PENALTIES IN GENERAL

Having thus set forth its legal doctrine respecting crimes, which constitute the principal object about which penal law is concerned, the Code passes immediately to a statement, exposition and explanation of its legal teaching regarding penalties in general, thus preparing the way for the proper understanding and application of the substantive or positive part of its penal law, namely, the individual crimes and the penalties proper to them.

1. In a short preliminary section, consisting of only one canon, the Church sets forth its right to coercive power, and renews the admonition of the Council of Trent, defining the

[21] Canon 2210, § 1.

[22] Canon 2210, § 2.

spirit in which the penal law of the Church should be interpreted and applied.

Asserting its full juridical perfection, the Church declares: "It is the innate and proper right of the Church, independently of all human authority, to chastise her delinquent subjects with penalties both spiritual and temporal." [23] As the existence of this right flows from the fact that the Church is a juridically perfect society—a matter already discussed—we may proceed immediately to the admonition of the Council of Trent regarding the spirit and right use of penal power.

"Superiors should bear in mind that they carry a staff—not a scourge; and that they ought to preside over those subject to them—not so as to dominate them, but to love them as sons and brothers; and to strive by exhortation and admonition to deter them from what is unlawful that they may not be obliged to coerce them by due punishments. If through human frailty they should fall into sin, the precept of the Apostle should first be observed, namely, that superiors should persuade, rebuke and beseech in all goodness and patience, since kindness is usually more effective than severity, exhortation than threats, charity than power. If, however, there is need of punishment because of the gravity of the crime, then justice must be tempered with mercy, firmness with kindness, so that discipline so necessary for the public good, may be preserved, and that those who are corrected be converted or, at least, that others be deterred from imitating their vices." [24]

In this section of its penal law, the Code follows practically the same order as in the section on crimes—stating the precise nature of a punishment, enumerating its principal divisions, determining the active and passive subjects of the punitive power, outlining the causes exempting from penalties, decreeing the effects of penalties and the manner in which they are distinguished.

[23] Canon 2214, § 1.

[24] Canon 2214, § 2.

2. An ecclesiastical penalty is defined as the "privation of some good, inflicted by ecclesiastical authority for the correction of the delinquent and the punishment of the crime." [25] Three elements are clearly and quickly discernible in this definition, namely, the nature of a penalty, its objects or ends, and its author. Firstly a penalty is a *privation* of some good. It is an evil inflicted for the purpose of repressing or punishing another evil. It causes suffering, as every privation causes suffering, inasmuch as it is a lack of something that perfects and completes the well-being of man. In such fashion a privation of some good, enjoyed by one's fellows, often begets at least as keen an awareness that crime does not pay as the positive infliction of some physical pain or torture. The *good* of which the delinquent may be deprived may be a temporal or spiritual good. Although in the dim, distant past the Church inflicted corporal as well as spiritual punishments on her delinquent subjects, it must be recalled that in the old days corporal punishments were regarded as suitable because, as one authority puts it, "of the roughness of the ways of the people in those times." Now the penalties decreed by the Code bear only the character of privation. If corporal punishments are no longer inflicted today, this cannot be attributed to a lack of power but rather to the prudence of the Church which accommodates itself to the exigencies and necessities of the times in those things which, from Divine Precept, must not necessarily be used. It is always the part of wisdom to accommodate oneself to the times, as long as absolute principles and values are not compromised.

While the ultimate end of ecclesiastical punishments is to protect and preserve the social order, the proximate ends which ordinarily serve as means for obtaining the ultimate end, are the correction of the delinquent and the punishment of the crime. The punishment of the crime serves especially to secure the ultimate social purpose of punishment since, by public punishment, public authority is vindicated and public

[25] Canon 2215.

order and security are thereby restored. The correction of the delinquent serves especially to secure the special purpose of ecclesiastical punishment, namely, the restoration of the delinquent to the path of duty and the promotion of his eternal salvation since by punishment and privation he is made keenly aware of the folly and pain of sin.

The author of the punishment must be a lawfully constituted superior, who possesses the power to make or enact laws, else his punishments are invalid and ineffective. Who he is will be seen later.

3. Penalties are divided by reason of their object into spiritual and temporal penalties; by reason of their purpose into medicinal, vindicative and preventive penalties; by reason of the manner in which they are incurred into automatic penalties, and penalties which must be imposed by a judge; and, by reason of their author, into penalties decreed by the law itself or by a particular competent superior.[26]

Your special attention is called here to one of these divisions because of its importance with regard to the manner in which penalties are incurred. This division is that which distinguishes between automatic penalties and those which must be imposed or inflicted by a superior or a judge. Generally, in inflicting penalties, it is the part of the legislator to enact it, of the judge to inflict it, and of the delinquent to bear it. At times, however, in our law, the law itself assumes the office of judge and inflicts the penalty upon the delinquent immediately upon the commission of the crime. As far as we know, automatic penalties are unknown in civil law. In the civil penal codes a penalty is imposed only in court after the delinquent has been proved guilty of the crime. The reason why the Church can and does inflict automatic penalties is based on the end which she wishes to obtain. The special purpose of the Church is the salvation of souls above all else; and this requires that its power not be limited to public acts, but that it be extended to all human acts, at least those externally

[26] Canons 2216-2217.

manifested. This end requires also that the forum of conscience be touched by the power of the Church, since many of the most sacred offices it confers are executed without any witnesses, and only the fear of a penalty touching the conscience can repress malice or negligence in exercising these offices.

An important point must be made here. It is this: The effect of a particular penalty is aggravated and increased after a criminal trial in which a sentence is passed *declaring* that the penalty has been incurred, in the case of automatic penalties, or actually inflicting the penalty, in the case of penalties that have to be imposed. In the first case the sentence is called a declaratory sentence; in the second case it is called a condemnatory sentence. The effect of both sentences is the same; and these sentences can be issued only in cases in which the crime committed was *public* and *certain*. For example, a person commits a crime to which is attached an automatic penalty of excommunication. He is immediately cut off from the Church and suffers certain disabilities. If that crime was public, a trial can be instituted to *declare* publicly and officially that the penalty has been incurred. If such a declaratory sentence is issued, the disabilities already incurred are aggravated. To give one special example. Before a sentence, acts of jurisdiction placed by an excommunicated cleric are unlawful but valid, but after a sentence, the acts are also invalid.[27]

4. A matter of supreme importance in any penal law is the precise determination of those persons in whom the coercive or punitive power has been legally vested. As indicated above, there is a distinction between enacting and applying a penalty. Only those having legislative power can enact a penalty and only those having judicial power may apply or impose a penalty.[28] In our law ecclesiastical superiors, as a rule, enjoy full legislative and judicial power.

[27] Canon 2264.

[28] Canon 2220, § 1.

In general it may be said that there are three persons—one a moral person—who have the power to enact penalties. Firstly, the Supreme Pontiff, who can decree penalties for the entire Church, for all persons and all places; secondly, a National or Provincial Council, which can respectively decree penalties for a whole nation or for an ecclesiastical province; and, thirdly, Bishops, who can decree penalties only for their own dioceses.[29] In addition to the power to attach penalties to laws enacted by themselves, these superiors can attach a penalty to a law passed by their predecessors, or to the Divine Law, or to a law passed by an ecclesiastical superior which is in force in their territory; or they can increase the penalty that may already be attached to the law.[30]

These same persons and the ecclesiastical Tribunals and delegated judges appointed by them, and within the limits of their competency, may apply the penalties enacted. To guide the judge in the exercise of this power, and especially to guard against too rigid an application of justice, the Code has issued a series of rules, some general, others particular. Too many to be related here, it may be said only that in this respect the Code has attempted to strike a happy medium, avoiding a too rigid system of rules without, at the same time, leaving too much to the arbitrary discretion of the judge.[31]

5. Having determined who are the superiors who have the power of inflicting penalties, it is important now to determine who are the persons subject to this power. The Code decrees, in general, that all baptized persons, whether Catholic or non-Catholic, are subject to the general penal law of the Church, as contained in the Code, and are likewise subject to the penal law of the diocese in which they have a domicile or quasi-domicile. If they have no domicile or quasi-domicile, they

[29] Cf. Vermeersch-Creusen, *Epitome juris canonici*, III, n. 411. This list is not taxative.

[30] Canon 2221.

[31] Cf. especially Canons 2223, 2224, 2231, 2233, 2234, 2235.

are subject then to the law of the particular diocese in which they are actually staying.[32]

There are four exceptions to this rule. Firstly, penalties cannot be inflicted and declared on those who hold supreme power in a State, and their sons and daughters, and those who have the immediate right of succession, except by the Roman Pontiff;[33] secondly, unless they are expressly named, Cardinals do not incur any penalties of the general law; and Bishops do not incur the automatic penalties of suspension or interdict;[34] thirdly, those who have not yet reached the age of puberty do not incur automatic penalties of general law;[35] and fourthly, Orientals do not incur the penalties of general law except in regard to those laws which, from their very nature, affect even Orientals—for example, the crime of heresy.[36]

At this point mention may be made of a general regulation that is unique in penal law and, so far as I know, is peculiar to ecclesiastical penal law. Before stating this regulation it is important here to point out that, unlike civil society, there are two tribunals or forums in the Church—two spheres or places in which power is exercised, viz. the internal forum and the external forum. The *internal forum,* called the forum of conscience, deals with matters that primarily concern man's conscience; that concern man directly, as an individual; that concern his relations to God. Jurisdiction is exercised in this forum privately, usually in the Sacrament of Penance, without the Church taking official cognizance of its acts. The external forum deals with matter primarily of a public character, referring to the public and common good, viz. public standing of persons in the Church, and is exercised publicly with social and juridical effects.[37] According to the general rule, auto-

[32] Canon 2226, § 1. Cf. also Canons 14, 87; and Cappello, *De censuris,* n. 15.

[33] Canon 2227, § 1.

[34] Canon 2227, § 2.

[35] Canon 2230.

[36] Canon 1.

[37] Canon 196; cf. Cappello, *Summa juris publici ecclesiastici* (Romae, 1923), n. 163.

matic penalties go into effect at the precise moment the crime has been committed. Then the delinquent is obliged to observe them in both *fora,* internal and external, even if he is the only one who knows that the crime has been committed. Anxious, however, to safeguard the reputation even of her disobedient children, the Church has made two provisions: namely, that as long as an automatic penalty remains occult the delinquent is excused from observing it, as long as he is unable to observe it without infamy or disgrace in the external forum; and that no one—not even a superior—can demand the observance of a penalty of the same kind in the external forum unless the crime is notorious. In these cases the penalty remains but the delinquent is obliged to observe its various effects in the external forum only if and in those matters in which no loss of reputation may be probably feared.[38]

6. Once a penalty has been incurred it binds and follows the delinquent all over the world unless, and until, it has been extinguished.[39] In Canon Law a penalty is extinguished by death, by fulfillment or expiation, by remission or removal by a competent superior, or by prescription.[40] Only the latter two need explanation. Removal or remission of a penalty by absolution or by dispensation can be granted only by the competent superior, or by his successor, or by him to whom this power has been given.[41] Absolution or dispensation from a penalty may be given to one present or absent, conditionally or absolutely, orally or in writing, for the external forum or for the internal forum only.[42] Prescription of penalties refers not to penalties that have already been incurred, but only to those that must be imposed by action of a judge. According to our law, the time required for instituting criminal action against a delinquent is limited to three years, with the following ex-

[38] Canon 2232, § 1.

[39] Canon 2226, § 4.

[40] Canon 2236, § 1.

[41] Canon 2236, § 1.

[42] Canon 2239.

ceptions: (1) Actions for injuries: for example, defamation and wounding, are extinguished by a lapse of one year. (2) Actions for qualified offenses against the Sixth and Seventh Commandments are extinguished by a lapse of five years. (3) Actions for simony and homicide are extinguished by a lapse of ten years.[43]

PENALTIES IN PARTICULAR

As stated above, there are three kinds of penalties in our law, viz. *medicinal* penalties, called censures; *vindicative* penalties; and preventive penalties, called penal remedies and penances. It may be emphasized here that, in making the distinction between medicinal or corrective penalties and vindicative or repressive penalties, one must guard against an erroneous impression. It would be a mistake to suppose that in inflicting vindicative penalties the church excludes altogether the correction and reformation of the delinquent; or that in inflicting medicinal penalties it does not aim at securing and maintaining respect for its laws and at deterring others from crime. In all its penalties the church always has a twofold object in view, viz. the amendment of the delinquent and retribution for the crime. The reason for the distinction between the two classes of penalties is this: the amendment of the delinquent is the primary and preponderant motive in inflicting medicinal penalties, and retribution for the crime the secondary motive; whereas, in inflicting vindicative penalties the primary motive is retribution for the crime, and the secondary motive is the amendment of the delinquent.[44]

MEDICINAL PENALTIES

The first kind of penalty treated by the Code is the medicinal penalty or censure—the latter name more commonly used than the former. It may be repeated again that the primary purpose of this kind of penalty is to effect the amend-

[43] Canon 2240; Canon 1703.

[44] Cf. Wernz, *o. c.*, n. 73.

ment of the delinquent; and that when this has been accomplished release from the penalty is mandatory.

1. Following the time-honored method the Code first defines precisely what constitutes an ecclesiastical censure or medicinal penalty. "A censure is a penalty by which a baptized person, delinquent and contumacious, is deprived of certain spiritual goods or of goods annexed to spiritual things, until after he has receded from his contumacy and is absolved."[45] This penalty is considered to be so serious that the Code warns ecclesiastical superiors: "Censures, particularly those incurred *ipso facto*, and above all excommunication, should not be inflicted except after the most careful and prudent consideration."[46]

The important note in the make-up of a censure is what the law calls contumacy, which involves stubborn disobedience of the law. Because of its importance, the Code makes it a special point to indicate when this willful and stubborn disobedience on the part of a delinquent is present and when it has disappeared. When there is question of censures which must be imposed, a person is considered contumacious who, despite warnings and admonitions that he recede from his contumacy, does not refrain from committing the crime, or refuses to do penance for the crime committed, or make reparation for the losses and scandal that have occurred. When there is question of censures automatically incurred, it is sufficient that the delinquent transgress a law or precept to which the penalty has been attached.[47] A delinquent is considered as having receded from his contumacy when he has sincerely repented of the offense committed, and made fitting reparation for the injury caused and the scandal given, or has seriously promised to do so. It is for the superior from whom the absolution is asked to pass judgment on the sincerity of the repentance, the sufficiency of the reparation, or the worth of the promise.[48]

[45] Canon 2241, § 1.
[46] Canon 2241, § 2.
[47] Canon 2242, § 2.
[48] Canon 2242, § 3.

2. Like all penalties, censures are divided 1) into censures imposed by law or by a particular superior; and 2) into those incurred automatically or by imposition by a competent superior. There is, however, one further division peculiar and proper to censures alone, viz., into reserved and non-reserved censures. This division has reference *only* to the matter of release from censures by absolution. Briefly and simply, reservation of censures means that the law or a particular superior has withdrawn from all others the power to absolve from certain censures—these are called reserved censures. They may be reserved in a particular case by a particular superior—then they are called reserved by man. In this case, absolution from the censure is reserved to the superior who inflicted it. Or they may be reserved by the general law itself—then they are called reserved by law. These latter are reserved to the Bishop of the diocese or to the Holy See. Those reserved to the Holy See are reserved in either of three ways, viz. simply, specially, or most specially. In this case absolution from these censures is reserved to the Holy See or to one delegated by the Holy See. Naturally the most serious crimes are reserved most specially, and so on.[49]

3. The division of censures into three kinds, viz. excommunication, interdict and suspension, is one that dates back to a decretal of Innocent III who reigned as Supreme Pontiff at the close of the 12th and the beginning of the 13th century. This division has never varied since and is now officially accepted by the Code.

Before stating the special laws regarding these penalties, the Code defines what is meant by the terms "divine office" and "lawful ecclesiastical acts," terms which are used in the laws that follow.

By divine offices are meant functions of the power of Orders which, by the institution of Christ or the Church, pertain to Divine Worship and are reserved to clerics, viz. celebration of Mass, Benediction of the Blessed Sacrament, Vespers, etc. By

[49] Canon 2245.

lawful or legal ecclesiastical acts are understood: the office of administrator of ecclesiastical property, of judge, notary, chancellor, lawyer, proxy, or sponsor at Baptism and Confirmation, the right of voting or of exercising the right of patronage.[50]

EXCOMMUNICATION

The gravest and the most severe penalty which the Church inflicts is that of *excommunication*—a censure by which a person is excluded from the communion of the faithful, with effects specifically enumerated in the sacred canons, and which cannot be separated.[51] This penalty has often been likened to death and is very aptly called *an exile from the Church of Christ*. "For as a Roman citizen condemned to exile lost all his rights of citizenship, so also does an excommunicate become divested of all his rights as a citizen of the City of God on earth, that is, as a member of the true Church." The excommunicate does not cease to be a Christian, but he is as if outlawed from Christian society—a stranger in the Christian family—and separated from the Church. This right to exclude unworthy members obviously and necessarily belongs to every society as an essential condition for its proper organization, administration and even existence. It has been exercised from the very beginning and was explicitly conferred on the rulers of His Church by Christ Himself. Speaking of an offender who remained contumacious after being warned in the presence of two witnesses, Christ said: "And if he will not hear thee, tell the Church. And if he will not hear the Church, let him be to thee as the heathen and the publican." (St. Matt. xviii, 17).

Although the Code explicitly distinguishes only two classes of excommunicated persons, viz. the *vitandi*, those who are to be shunned or avoided, and the *tolerati*, those who may be

[50] Canon 2256.

[51] Canon 2257, § 1; cf. Hyland, *Excommunication*. (The Catholic University of America Canon Law Studies, n. 49, Washington, D. C.: The Catholic University of America, 1928).

tolerated, yet practically speaking, there are three classes since the *tolerati* may be divided into two groups, viz. those simply excommunicated, and those upon whom a declaration or condemnatory sentence of excommunication has been passed by a judge after a judicial trial in the case of a public crime. A special word may be said here regarding the excommunicated person called the *vitandus*. The distinction between *vitandi* and *tolerati* dates back to the time of Pope Martin V (1418). Up to that time people were obliged to avoid communication with all excommunicated persons. Martin then lifted the restraint on communication with all except those publicly excommunicated by name. These latter then were to be shunned, avoided; hence the name *vitandus—to be avoided.* "No one", warns the Code, "is *vitandus* unless he has been excommunicated by name by the Holy See, and unless the excommunication has been publicly declared, and unless in the decree or sentence of excommunication it is expressly stated that he is to be shunned." [52] The one single exception to this rule is that he is vitandus *ipso facto* who lays violent hands on the person of the Holy Father.

As already stated, the general effect of excommunication is exclusion from membership in the Christian society and the consequent privation of the rights and privileges of that membership. To eliminate as far as possible all doubt in the application of this gravest of all penalties, the legislator defines in nice detail in several canons in what sense and how far the benefits of membership in the Church are lost by the different classes of excommunicates. Some of the more serious disabilities may be recounted here.[53]

1. All excommunicated persons have lost the right to assist at divine services with this single exception: they have the right to be present at the preaching of sermons.

2. Excommunicated persons may not receive the Sacraments; and, after sentence has been passed, not even the sacramentals.

[52] Canon 2258, § 2.

[53] These disabilities are enumerated in Canons 2259-2267.

3. Excommunicated persons upon whom sentence has been passed are deprived of the right to Christian burial, unless they gave certain signs of repentance before their death.

4. Excommunicated persons have no share in the indulgences and public prayers of the Church. It is not forbidden, however, for the faithful to say private prayers for them; nor is it forbidden for priests to say Mass *privately* for them. In the case of a *vitandus*, however, Mass can be said only for his conversion.

5. Every excommunicated person is debarred from the exercise of lawful ecclesiastical acts, and is forbidden to perform ecclesiastical offices or functions.

6. An excommunicated ecclesiastic is forbidden to say Mass and to administer the Sacraments and the sacramentals.

7. An act of jurisdiction, performed by an excommunicated person, is unlawful; it is also invalid if performed by a *vitandus* or one upon whom a sentence has been passed, with the single exception that any excommunicated priest can validly and lawfully absolve a dying penitent.

8. Excommunicated persons cannot *lawfully* exercise certain rights, e. g., voting in an ecclesiastical election, or acquire dignities, offices, or pensions, or other functions in the Church; they cannot *validly* exercise such rights or acquire such offices if they are *vitandi*, or after a sentence has been passed. After a sentence has been passed, the fruits of any benefice or office already possessed are forfeited; and a *vitandus* is deprived of the offices and dignities themselves.

9. The final effect of excommunication which is applicable only to *vitandi* has had a long, varied and interesting history, and stands today stripped of much of its former rigor and severity. This effect, briefly, is the obligation on the part of the faithful to avoid communication or intercourse with them in secular affairs. Exception is made

for spouses, parents, children, servants, subjects, and generally for all who have a reasonable cause for dealing with them.

Such is the penalty of excommunication. It is truly a grave penalty. But it is true also that nothing is a more potent incentive for the sinner to repent than the fact that he is an outlaw from Christian society—isolated, cut off, and disowned; and nothing is better designed to convince the faithful of the dread character of excommunication.

THE INTERDICT

A somewhat unusual penalty, similar in some respects to excommunication, is known as the *interdict*—a "censure by which the faithful, while remaining in communion with the Church, are forbidden the use of certain sacred things." [54] The prohibition is made either directly by a personal interdict, which forbids to persons themselves the use of certain spiritual goods; or indirectly by a local interdict, which forbids the administration or reception of these goods in certain places.[55] Unlike excommunication, the interdict does not deprive one of all the privileges of membership in the Church, nor does it necessarily suppose a personal fault, since it may fall upon a moral person as well as upon a physical person, or even upon a place. The essential difference, however, between the two rests in the fact that an interdict does not separate a person from the communion of the Church. It may be noted here, in passing, that this penalty has a history that has seen famous cities and even whole kingdoms under interdict for many years; and that it has been modified and mitigated considerably during the years.

As indicated above, an interdict may be local or personal; general or particular; total or partial. These distinctions have

[54] Canon 2268, § 1; cf. Conran, *The Interdict* (The Catholic University of America Canon Law Studies, n. 56, Washington, D. C.: The Catholic University of America, 1930).

[55] The effects of the various kinds of Interdict are contained in Canons 2269-2277.

their own practical importance, especially in determining who can inflict this penalty, and who are bound to observe it.

(a) A general local interdict on the territory of a whole diocese, or nation, or republic, and a general personal interdict on the people of a diocese or nation can be inflicted only by the Holy See. An interdict on a parish, or on the people of a parish, or a particular local or personal interdict, can be decreed by the Bishop of the place.

(b) A personal interdict follows the person everywhere he goes; a local interdict has no force outside the interdicted territory—but inside the interdicted territory *all persons,* including strangers, are obliged to observe the interdict unless they have a special privilege.

(c) A local interdict, whether general or particular, forbids in the place interdicted all divine offices and sacred rites.

Important exceptions to this rule are: permission to administer the Sacraments to the dying at all times; to administer, in certain cases, the Sacraments of Baptism, Penance and Holy Eucharist; and to assist at marriages and to conduct funeral service, but without any external solemnity.

As in the case of local interdicts, so personal interdicts may be general or particular, and then their effects vary.

(1) Those upon whom a particular personal interdict has been inflicted are forbidden, in the same manner as excommunicated persons, to assist at divine services, to administer or receive the Sacraments and the sacramentals, and to exercise the rights of election, presentation, or nomination. In the same way they are also debarred from dignities, offices and pensions in the Church; and, in the same way, after a declaratory or condemnatory sentence, they are to be deprived of Christian burial.

(2) The law states that there are three ways of placing a *general* personal interdict, i. e., an interdict on a community or corporate body, viz. a college, university.

It may be inflicted on individual delinquents, who then suffer the same disabilities as those personally interdicted, as related above.

It may be inflicted on the community or body as such; then the community cannot exercise any spiritual rights it possesses as a body.

It may be inflicted on the community as such and on the individual delinquents; then the above mentioned effects are cumulative.

The Code ends its legislation on interdicts by a special regulation respecting a species of personal interdict that is one of the most ancient forms of interdict, and was one of the most common in the old law, viz. the interdict forbidding entrance into a church. This interdict forbids one to celebrate or assist at divine offices in a church or to receive ecclesiastical burial. However, if one should assist, there is no obligation to expel him; and if he has been buried, there is no obligation to remove his body.

One of the graver ecclesiastical penalties, the interdict, while apparently severe at times on the innocent, has proved in the past to be most effective in fulfilling its purposes. Among others, its purposes have been to show displeasure towards and to correct public misconduct, to secure the repentance of those who have been guilty of sacrilegious crimes, to curb those, especially in high places, who would do violence to the Church and to society in general, and to bring to their senses those who are publicly and seriously disobedient to ecclesiastical authority.

SUSPENSION

In order effectively to fulfill its purpose every society is obliged to appoint its own officials and to assign to each one certain and well defined rights and duties. For the same reason must every society possess the power to punish, especially by removal from office—either permanently or temporarily—those officials guilty of serious neglect or abuse of office;

and those guilty of conduct seriously unbecoming their high position.

Since its spiritual and temporal progress as a society would be impaired and the attainment of its end rendered difficult by the crime or the careless ministry of its officials, it is reasonable to expect that the Church would constitute penalties that would touch them exclusively.

Although, as will be seen, the Church has enacted other penalties of vindicative character against clerics, she has decreed only one medicinal penalty exclusively against them, viz. *suspension,* the third type of censure enacted by the Code, and defined as a "censure by which a cleric is forbidden to exercise the rights and powers belonging to him by reason of his office or his benefice, or both." [56] In addition to the fact that suspension is inflicted only on clerics, two general characteristics of this penalty may be noted. Firstly, it does not deprive the cleric of his office or of his benefice, but only of rights and powers flowing from them. Secondly, its effects are separable. A cleric may be forbidden the exercise of all the powers of his office, or of some, or of only one. It is sufficient for our purpose to enumerate here some of the more important effects of the various kinds of suspension.[57]

1. Suspension from office simply, without any limitation, forbids every act of power of orders and of jurisdiction.

2. Suspension from jurisdiction forbids every act of the power of jurisdiction.

3. Suspension from orders forbids every act of the power of orders received by ordination.

4. Suspension from a certain and definite *ministry* or *office,* e. g., hearing confessions, general care of souls, etc., forbids the exercise only of that ministry or office.

[56] Canon 2278, § 1; cf. Rainer, *Suspension of Clerics* (The Catholic University of America Canon Law Studies, n. 111, Washington, D. C.: The Catholic University of America, 1937).

[57] Canons 2279-2285.

As in the case of excommunication and interdict, the exercise of these rights and powers is not only unlawful but also invalid after a declaratory or condemnatory sentence of suspension has been passed.

As in the case of interdict, a moral person, viz. a community or college, may also be suspended. It is enough to point out here that the suspension may be incurred by a community of clerics in the same manner and under the same conditions as the interdict, as described above.

REMISSION OF CENSURES

Once any censure has been incurred whether excommunication, interdict or suspension, the final and most important questions are: How, when and by whom can it be removed? In answer to the first two questions it can be replied: By absolution, when and only when the delinquent has receded from his contumacy. And, be it noted, once the delinquent has ceased to be contumacious absolution cannot be denied or deferred.[58] Before answering the third question, it is important to recall the distinction between the internal forum and the external forum of the Church. The internal forum deals with matters of conscience usually in the Sacrament of Penance; the external forum deals with matters of a public character, e. g., the public standing of persons in the Church, in a public way. This distinction is important in the present matter especially for two reasons.

1. A censure is a penalty of the external forum and, *per se*, should be removed in the external forum.[59]

2. Absolution given in the external forum affects both *fora*. Absolution given in the internal forum affects *only* that forum. In this latter case, however, the person absolved can—if no scandal is caused thereby—conduct himself as if absolved in the external forum.

[58] Canon 2248, § 1, 2.

[59] Cf. Cappello, *o. c.*, n. 44, 97.

Now in answer to the question, "Who can absolve from a censure?" it may be responded: Ordinarily, the superior who decreed the censure or to whom the censure was reserved, or his superior or delegate.[60]

However, anxious always to provide for the eternal welfare and good name of its subjects, the Church has introduced two general and very important and practical exceptions to this rule.

According to the first exception, all those who are in danger of death may be absolved by any priest whatsoever from any censure, no matter how or by whom it is reserved. In certain cases, if and when they recover, they are obliged to have recourse through the confessor to the superior who had reserved the censure, and of obeying his orders.[61]

According to the second exception, in two so-called urgent cases when, namely, reserved automatic penalties cannot be observed without danger of grave scandal, or infamy, or *if* it would be a hardship for a person to remain in the state of grave sin until a competent superior could be approached, then any confessor, in confession, can absolve from these penalties, no matter how they are reserved. In these cases, however, the penitent is obliged within a month, and through the confessor, to have recourse to the competent superior and to carry out his orders.[62]

II. VINDICATIVE PENALTIES

Although it is clear, from the foregoing exposition that a censure is, in every sense of the word, a punishment, yet the name punishment is more properly applied to a vindicative penalty since this penalty is inflicted primarily to punish the crime and only secondarily to effect the amendment of the delinquent. As defined by the Code a vindicative penalty is one which "is inflicted directly for the punishment and expiation of the crime, so that its remission does not depend on the

[60] Canon 2253.

[61] Canon 2252.

[62] Canon 2254.

cessation of the contumacy of the delinquent." [63] Unlike censures, these penalties are inflicted for a definite time or forever, and, while amendment *may* win for the delinquent a release from them, it does not give him a *right* to be released from them.

Vindicative penalties are of two kinds, viz. those common to all the faithful; those special to clerics.

Those that may be inflicted on all the faithful, according to the gravity of their offenses, are chiefly, but not exclusively, the following: [64]

1. Local interdict, interdict on a community, and interdict from entering the church forever, or for a certain time, or at the will of the superior.
2. Infamy of law.
3. Privation of ecclesiastical burial.
4. Disqualification for ecclesiastical favors or functions, or for academic degrees conferred by ecclesiastical authorities.
5. Privation of the right to titles of honor, to a distinctive dress, or to insignia bestowed by the Church.
6. Pecuniary fines.

Vindicative penalties that may be inflicted only on clerics range from the prohibition to exercise the sacred ministry, except in a certain church, to perpetual suspension, deposition and degradation.[65]

Once inflicted, vindicative penalties are extinguished by expiation or fulfillment, or by dispensation granted by a competent superior.

(1) If the penalty was inflicted for a definite time or under a certain condition it ceases, of itself, when the time has elapsed or the condition is fulfilled.

[63] Canon 2286.

[64] Canons 2291-2297.

[65] Canons 2298-2305.

(2) If it is perpetual, release from it *may* be obtained by dispensation granted by the competent superior. This rule applies also to the release from a temporary penalty before its time limit arrives.

(3) The superior competent to dispense from a vindicative penalty is the superior by whom it was imposed, his successor, his superior in the matter, or he to whom this power has been delegated.[66]

Here again, desirous of preserving the reputation even of its delinquent children, the Church makes certain provisions for the suspension of the observance of vindicative penalties or for their easy dispensation in urgent circumstances. These provisions are:

"If the delinquent cannot observe an automatic vindicative punishment without making known his sin, which would entail loss of reputation and scandal, any confessor may, in the sacramental forum, suspend for him the *obligation of observing the punishment,* but must impose upon him the burden of having recourse, at least within a month, by letter and through the confessor, if this can be done without grave inconvenience, no name being mentioned, to the Sacred Penitentiary or to the Bishop if he has the required faculties, and of accepting their orders." [67]

"If, however, in some extraordinary case, recourse to the superior is not possible, the confessor himself can grant the dispensation, in the same manner as he can, in the like circumstances, absolve from reserved censures." [68]

III. PENAL REMEDIES AND PENANCES

The third and final type of penalty enacted by the Code comprises the essentially preventive penalties called *penal remedies* and *penances.*

[66] Canon 2289.

[67] Canon 2290, § 1.

[68] Canon 2290, § 2.

Penal remedies are measures taken by the ecclesiastical authorities to prevent the commission of a crime by those who are in a serious and proximate danger of committing one, or by those who are strongly suspected of being in such danger. While these remedies are intended primarily to act as preventives of crime, at times they are imposed also in cases where grave crimes have already been committed, especially to prevent a relapse or second offense. The chief penal remedies are four: (1) the canonical warning; (2) the canonical rebuke; (3) the canonical precept or command, all administered by the Bishop or his delegate; and (4) canonical surveillance, ordered by the Ordinary.[69]

Penances, canonical, as distinguished from sacramental or other forms of penance, are imposed in the external forum on a delinquent for two general purposes, viz. that he may escape a penalty properly so called, or that he may obtain absolution or dispensation from a penalty already incurred.

The principal penances that may be imposed are:

1. The recitation of certain prayers.
2. A pious pilgrimage or other pious work.
3. A special fast.
4. Almsgiving.
5. A spiritual retreat.[70]

Part III. Penalties for Individual Crimes

It is obviously beyond the scope of this paper to enumerate the particular ecclesiastical crimes and the penalties attached to them. It is enough to state here that among the crimes that may be committed are crimes against the faith and unity of the Church; against religion; against ecclesiastical authorities, persons and things; against life, liberty and good morals; and on the occasion of the administration and reception of the sacraments and of ecclesiastical dignities and offices. It is enough also to state here that, in accordance with the prin-

[69] Canons 2306-2311.

[70] Canons 2312-2313.

ciples of the divine law and human prudence, penalties in number and kind are made to fit the individual crime.[71]

Conclusion

Undoubtedly you have noticed some similarities and some differences between civil penal law and ecclesiastical penal law. The same is true, it may be stated here in conclusion, with respect to their fundamental principles. The basis or juridical title of the punitive or coercive power in the Church is the same as in the State, viz. the indeclinable necessity of protecting and conserving the social juridical order, and of restoring it when violated by the criminal abuse of human liberty. Yet, in practice, there is a great difference between the two systems. The difference stems from the fact that the "*protection of the juridical order*", which in both societies constitutes the proximate basis or foundation of coercive power, has an essentially different importance and meaning when there is question of the civil and when there is question of ecclesiastical society.

In civil society the *protection of the social juridical* order is an end in itself, and *an adequate end,* to such an extent that no other end besides this is directly sought by the civil authority; and, therefore, in inflicting punishments the civil authority in no wise intends directly and principally either the good of the individual or the amendment of the delinquent.[72] In ecclesiastical society, on the contrary, the *protection of the social juridical order* is not an end in itself, but rather a means to be positively directed from the intention of its Divine Founder to its supernatural last end, viz. the sanctification of the souls of the individual faithful. Hence it follows that the Church, when it inflicts punishment in the external forum, is concerned principally and directly with the restoration of the public order in such a way that, in its penal system, it can never abstract from the character of social retri-

[71] Cf. Canons 2314-2414.

[72] Cf. Cappello, *Summa juris publici ecclesiastici,* n. 81.

bution. However, it must also be a matter of primary concern that the social retribution, which is intrinsically proper to punishment, should *at the same time* contribute to the correction and amendment of delinquents. Thus is explained why, in the ecclesiastical penal system, punishments, both *medicinal,* or corrective, and *vindicative,* or retributive, are used according as the Church principally and directly intends the ultimate social end—the sanctification of the delinquent—or the proximate social end—the restoration of the public order that has been violated. Thus is explained also the practice of the Church in facilitating the remission of even the gravest penalties in cases of extreme or urgent spiritual necessity.

Cases and Studies

PROFESSION OF FAITH BY CONVERTS *

Nowhere in *The Code of Canon Law* does one find rules which govern the exact procedure to be followed in all cases for the reception of converts into the Church. This is because the Code does not envisage the definition of *convert* in the sense in which it is understood in this study. The word *conversus* in the Code refers to one in the religious life.[1] Only incidental references are found to the act of conversion as it is understood in this treatment.[2] The definition of conversion in the Code refers to incorporation into the society of the Church by means of baptism.[3]

The most pertinent legislation is found in canon 2314:

> § 1. Omnes a Christiana fide apostatae et omnes et singuli haeretici aut schismatici:
> 1°. Incurrunt ipso facto excommunicationem;
> § 2. . . . si tamen delictum apostasiae, haeresis vel schismatis ad forum externum Ordinarii loci quovis modo deductum fuerit, etiam per voluntariam confessionem, idem Ordinarius, non vero Vicarius Generalis sine mandato speciali, resipiscentem, praevia abiuratione iuridice peracta aliisque servatis de iure servandis sua auctoritate ordinaria in foro exteriore absolvere potest; ita vero absolutus, potest deinde a peccato absolvi a quolibet confessario in foro conscientiae. Abiuratio vero habetur iuridice peracta cum fit coram ipso Ordinario loci vel eius delegato et saltem duobus testibus.

Reference to this canon which penalizes those who have defected from the faith is justified by the presumption that, when a delict is

* The present study is reproduced with proper permission from the dissertation of Rev. Joseph G. Goodwine, J.C.D., *The Reception of Converts*, n. 198, Canon Law Studies, The Catholic University of America, Washington, D. C.: The Catholic University of America Press, 1944.

[1] Cf. canons 564, § 2; 505, §§ 2,3.

[2] Cf. canons 300, § 2; 1062; 1070, § 1; 1099, § 1, 1°; 1121, § 1; 1122, § 2.

[3] Canon 87.—Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura.

committed, it is presumed in the external forum to have been done with deliberate malice.[4] Thus converts are looked upon in the eyes of the law as apostates, heretics or schismatics, and are governed by the prescriptions of canon 2314.[5]

In this canon the penalty of a *latae sententiae* excommunication is levied against apostates, heretics and schismatics, and the absolution in the external forum is reserved to the Ordinary. In the interpretation of the phrase *servatis de iure servandis* authors generally refer to an Instruction of the Holy Office, issued July 20, 1859.[6] Thus, Augustine,[7] Cappello,[8] Cerato,[9] Coronata,[10] Salucci,[11] and Wernz-Vidal [12] clearly state that this phrase must be interpreted exclusively according to the norms of the Instruction. Other authors such as Vermeersch-Creusen,[13] De Smet,[14] Cocchi,[15] Mothon,[16] Genicot-Salsmans,[17] Merkelbach [18] and Lydon [19] explicitly indicate

[4] Canon 2200, § 2.

[5] Haring, *Grundzüge des katholischen Kirchenrechtes* (2 vols., Graz: Ulrich Moser, 1924), II, 381.

[6] *Fontes,* n. 953; *Concilii Plenarii Baltimorensis II, in Ecclesia Metropolitana Baltimorensi, a die VII ad diem XXI Octobris, A. D., MDCCCLXVI Habiti et a Sede Apostolica Recogniti, Acta et Decreta* (ed. 2a, Baltimorae: Ioannes Murphy, 1894), Appendix I, pp. 277-279. Hereafter this Instruction will be referred to as "the Instruction" or "the Instruction of 1859."

[7] *A Commentary on the New Code of Canon Law* (8 vols., Vol. VIII, 2 ed., St. Louis: B. Herder Book Co., 1924), VIII, 283.

[8] *Tractatus Canonico-Moralis De Censuris iuxta Codicem Iuris Canonici* (ed. 2a, Taurinorum Augustae: Marietti, 1925), n. 215, 8°.

[9] *Censurae Vigentes Ipso Facto a Codice Iuris Canonici Excerptae* (ed. 2a, Patavii: Typis Seminarii, 1921), p. 144, n. 68.

[10] *Institutiones Iuris Canonici* (5 vols., Taurini: Marietti, 1928-1936), IV, p. 293, n. 1867.

[11] *Il Diritto Penale Secondo Il Codice Di Diritto Canonico* (2 vols. in 1, Subiaco: Tipografia dei Monasteri, 1926-1930), II, 15, nota 1.

[12] *Ius Canonicum* (7 vols. in 8, Romae, 1923-1938), VII, 416-417.

[13] *Epitome Iuris Canonici* (3 vols., Vol. I, ed. 6a, 1937; Vol. II, ed. 5a, 1934; Vol. III, ed. 5a, 1936, Mechliniae-Romae: H. Dessain), III, p. 312, n. 513.

[14] *De Baptismo,* nn. 304, 305.

[15] *Commentarium in Codicem Iuris Canonici* (5 vols. in 8, Taurinorum Augustae: Marietti, 1922-1930), VII, p. 226, n. 136.

[16] *Institutions Canoniques* (3 vols., Lille-Bruges: Desclée De Brouwer et Cie., 1922-1924), II, art. 2970.

[17] *Institutiones Theologiae Moralis* (ed. 14a, 2 vols., Dedebec-Buenos Aires: Desclée De Brouwer, 1939), II, n. 153.

that the procedure outlined in the Instruction is still to be followed in receiving converts, except for the abjuration and the absolution from the censure, which must take place in accordance with the law of canon 2314, § 2.

The authors who form the latter group seem to indicate that in receiving converts, the direct obligation is to follow the procedure outlined in the Instruction, but the law of canon 2314, § 2, is to be observed insofar as it interprets the Instruction. The former group point to canon 2314, § 2, as binding directly, though it is to be interpreted in the light of the Instruction. Both groups concede a mutual interdependence between the law of the Code and the procedure outlined in the Instruction, and thus advocate universal application of the Instruction in receiving converts into the Church. This general consensus of the authors as to the applicability of the Instruction indicates that it is not merely a particular response to an individual doubt, but that it embodies the general practice of the Church and is an application of the general law of the Code.

The Instruction reads:

> To the doubt proposed by the Most Reverend Bishop of Philadelphia concerning the Profession of Faith and the Absolution of heretics when they are converted, on Wednesday, July 20, 1859, the most eminent cardinals decreed that an instruction be given as follows.
>
> In the conversion of heretics there must be an inquiry into the validity of the Baptism received in heresy. After a diligent examination has been made, if it is found that no baptism was conferred, or that it was conferred invalidly, they are to be baptized absolutely. But if, when the investigation is completed, there still remains a probable doubt concerning the validity of the Baptism, then Baptism is to be repeated conditionally. Finally, if it is established that the Baptism was valid, they are to be received only to the Abjuration, or Profession of Faith. Therefore there is a threefold method of procedure in reconciling heretics:
>
> 1. If the Baptism is to be absolutely conferred, there is to be no Abjuration, or Absolution, because of the fact that the Sacrament of Regeneration takes away all stain.
>
> 2. If Baptism is to be repeated conditionally, this order of procedure must be followed:

[18] *Summa Theologiae Moralis* (ed. 3a, 3 vols., Parisiis: Desclée De Bouwer et Soc., 1942), III, n. 168.

[19] *Ready Answers in Canon Law* (San Francisco: Benziger Bros., 1934), v. *Converts*, p. 176.

(a) Abjuration or Profession of Faith,

(b) Conditional Baptism,

(c) Sacramental Confession with conditional Absolution.

3. Finally, when the Baptism was judged to be valid, only the Abjuration or Profession of Faith is to be made, which will then be followed by the Absolution from censures.

It is to be noted, however, that the Abjuration or Profession of Faith is different from the one set forth in the Bull of Pius IV. For the formula which is attached was prescribed by the Supreme S. C. of the Holy Office for the conversion of heretics, and the Bishop Petitioner is to use this together with the formula of Absolution which is also attached.

Manner of Receiving the Profession of Catholic Faith From Converts

The Priest wearing surplice and violet stole sits on the Epistle side (if the Blessed Sacrament is reserved in the tabernacle), otherwise in front of the tabernacle, and the convert kneels before him, and touching the book of Gospels with his right hand, pronounces the profession of faith as it is set forth below: if he does not know how to read, the Priest is to read it to him slowly, so that the convert can understand it and pronounce the words distinctly after the Priest. (Here follows the Profession of Faith. The text is quoted later in this study for purposes of comparison with the more recent formula approved by the Holy Office.)

After this the convert remains kneeling, while the Priest still sitting down recites the psalm *Miserere* or *De Profundis* adding the Gloria Patri at the end. When this is finished, the Priest stands and says: (Here follow certain prayers and the absolution from the excommunication. These are quoted in the footnote and are to be found in the addenda to the Roman Ritual for the use of the clergy of the United States.)

Finally the Priest is to impose a salutary Penance, e. g., certain prayers, a visit to a church, or some other like penances.[20]

[20] The above is the author's translation. The Latin text with the exception of the Profession of Faith is as follows:

Proposito dubio R.P.D. Episcopi Philadelphien. circa Professionem Fidei, ac Absolutionem haereticorum dum convertuntur, Feria IV, die 20. Julii 1859, Emi D.D. decreverunt dandam esse instructionem, prout sequitur.

In conversione haereticorum inquirendum est primo de validitate Baptismi in haeresi suscepti. Instituto igitur diligenti examine, si compertum fuerit, aut nullum, aut nulliter conlatum fuisse, baptizandi erunt absolute. Si autem investigatione peracta, adhuc probabile dubium de Baptismi validitate supersit, tunc sub conditione iteratur. Demum si constiterit validum fuisse, recipiendi erunt tantummodo ad Abjurationem, seu Professionem Fidei. Triplex igitur in conciliandis haereticis distinguitur procedendi methodus:

1. Si Baptismus absolute conferatur, nulla sequitur Abjuratio, nec Absolutio, eo quod omnia abluit Sacramentum Regenerationis.

2. Si Baptismus sit sub conditione iterandus, hoc ordine procedendum erit:
   (a) Abjuratio seu Fidei Professio,
   (b) Baptismus Conditionatus,
   (c) Confessio Sacramentalis cum Absolutione conditionata.

3. Quando denique validum judicatum fuerit Baptisma, sola recipitur Abjuratio seu Fidei Professio, quam Absolutio a censuris sequitur.

Notandum vero Abjurationem, seu Professionem Fidei aliam esse ab ea quae habetur in Bulla Pii IV. Nam a Suprema S. C. S. Officii praescripta fuit illa, quae adnectitur, pro conversione haereticorum, eaque utetur Episcopus Orator, cum formula Absolutionis, quae pariter adjungitur.

Modus

Excipiendi Professionem Fidei Catholicae a Neo-Conversis

Sacerdos superpelliceo et stola violacei coloris indutus, sedet in cornu Epistolae (si SS. Sacramentum asservetur in tabernaculo) sin minus in medio Altaris, et coram illo genuflectit Neo-conversus; qui codicem Evangelii dextra manu tangens, emittit professionem fidei, prout inferius habetur: vel si nesciat legere, Sacerdos praelegit eidem tarde professionem, ut Conversus eamdem intelligere, et cum Sacerdote distinctis verbis pronuntiare possit.

* * *

Postea, neo-converso genuflexo manente, Sacerdos sedens dicit psalmum Miserere, *sive psalmum* De profundis, *cum* Gloria Patri *in fine. Quo finito, Sacerdos stans dicit:*

Kyrie eleison. Christe eleison. Kyrie eleison. Pater noster, secreto.

V. Et ne nos inducas in tentationem.

R. Sed libera nos a malo.

V. Salvum fac servum tuum (ancillam tuam).

R. Deus meus, sperantem in te.

V. Domine, exaudi orationem meam.

R. Et clamor meus ad te veniat.

V. Dominus vobiscum.

R. Et cum spiritu tuo.

Oremus

Deus, cui proprium est misereri semper et parcere, suscipe deprecationem nostram, ut hunc famulum tuum (hanc famulam tuam) quem (quam) excommunicationis catena constringit, miseratio tuae pietatis clementer absolvat. Per Dominum nostrum Jesum Christum Filium tuum: qui tecum vivit et regnat in unitate Spiritus Sancti Deus, per omnia saecula saeculorum. *R.* Amen.

Deinde Sacerdos sedet et ad Profitentem genuflexum versus, eum ab haeresi absolvit, dicens:

Auctoritate apostolica, qua fungor in hac parte, absolvo te a vinculo excommunicationis quam (1) incurristi, et restituo te sacrosanctis Ecclesiae sacramentis, communioni et unitati fidelium, in nomine Patris et Filii et Spiritus Sancti. Amen.

Denique abjuranti aliquam Poenitentiam salutarem injungat, e. g. aliquas preces, visitare Ecclesiam, aut similia.

(1) In dubio gravi aut levi, utrum poenitens excommunicationem incurrerit per haeresim professam, sacerdos hic inserat vocabulum *forsan.*

From the text of the Instruction it is evident that in itself it is an answer to a particular doubt of the Bishop of Philadelphia, and therefore, is of obligation only in that particular diocese for which it was intended. However, from the fact that the Instruction embodies the general law and practice of the Church, it can be said that a certain universal obligation to follow the procedure set forth, at least substantially, does arise. It is the nature of an instruction to explain doubtful points in the law and to set forth certain norms whereby the law may be observed in practice. When, however, an instruction such as the instruction of the Holy Office under discussion tends to recall the common law, a real obligation to obey its prescriptions does arise.[21] Thus it seems that the necessity of an investigation into the fact and validity of the convert's baptism, and the procedure outlined for the results of that investigation must be adhered to universally. If the Holy See has approved other formulas for the abjuration or profession of faith or for the absolution from censures, and if such formulas were prescribed for particular dioceses, the more recent formulas certainly supersede those in the Instruction. In the absence of any such special regulations the Instruction should be adhered to in these details.

In its prescriptions regarding the profession of faith the Instruction does not indicate the presence of two witnesses. Canon 2314, § 2, on the other hand, definitely demands that at least two witnesses be present. Since the Instruction is opposed to the common law of the Code in this matter, it must be considered as abrogated, even though it remains in force in all its other prescriptions.

In the United States by reason of the legislation of the Plenary Councils of Baltimore, the Instruction has the status of particular law. The II Plenary Council of Baltimore (1866) decreed:

[21] Maroto, *Institutiones Iuris Canonici ad Normam Novi Codicis* (2 vols., Vol. I, ed. 3a, Romae: Apud Commentarium Pro Religiosis, 1921), I, n. 180, a: "Non raro Superiores ecclesiastici suis instructionibus intendunt in mentem subditorum revocare ea quae praecepta sunt vel prohibita ex iure divino vel ecclesiastico, universali aut particulari; tunc illae instructiones . . . sane obligant; quod si obligatio non dicatur promanare ex praescripto Superioris, oritur certe ex iuribus praeexistentibus. Sub hac ratione censendae sunt obligatoriae plures Instructiones Sacrarum Congregationum, maxime S. Officii et Cong. de Prop. Fide."

> In receiving converts from heresy into the faith we desire that that procedure be exactly followed which is contained in the form given by the Sacred Congregation of the Holy Office, July 20, 1859, and which is already printed in several ritual books. That it may be known to everyone, we shall take care to incorporate it in the Appendix. For there it is explicitly stated when Baptism is to be conferred absolutely, when conditionally, and when not at all.[22]

From the text of the decree it may be argued that no strict obligation to comply with the Instruction arises, even though it was the mind of the Fathers of the Council to institute a uniform practice in this country. From the text of the decree of the III Plenary Council, which repeated the recommendation of the former council, no such latitude of interpretation is allowed.[23]

> That due veneration for Baptism be preserved, and that all appearances of its illegitimate repetition be removed, the Church has prescribed that when one is converted to the faith from error, there must always be a diligent inquiry as to whether he has been baptized before, and whether the Baptism received in heresy was valid. A mere general investigation of the custom or practice of certain sects, from which can be had a presumption as to whether or not the Baptism was conferred, or as to its validity or nullity, is not sufficient; but, as far as it shall be possible, there must be an inquiry into the Baptism of the individual converts, so that the certitude or probability that they were or were not validly baptized may be obtained. When the investigation has been completed, the convert must be re-

[22] *Acta et Decreta*, n. 242: "In conversis ab haeresi ad fidem excipiendis, volumus ut ad amussim servetur modus ille, qui in Forma a Sacr. Congr. S. Officii, die 20 Julii, an. 1859, tradita habetur, et jam in quibusdam libris ritualibus typis impressus invenitur. Hanc, ut neminem lateat, in Appendicem referendam curabimus. Ibi enim explicite declaratur, quando Baptismus absolute, quando sub conditione, quando denique nullo modo sit iterandus."

[23] Cf. Beste, *Introductio in Codicem* (St. John's Abbey Press, Collegeville, Minn., 1938), pp. 935-936; Ayrinhac-Lydon, *Penal Legislation in the New Code of Canon Law* (revised edition, New York: Benziger, 1936), p. 158; MacKenzie, *The Delict of Heresy in Its Commission, Penalization, Absolution* (The Catholic University of America Canon Law Studies, n. 77, Washington, D. C.: The Catholic University of America, 1932), p. 116. Barrett, however, in his work, *A Comparative Study of the Councils of Baltimore and the Code of Canon Law* (The Catholic University of America Canon Law Studies, n. 83, Washington, D. C.: The Catholic University of America, 1932), omits all mention of the decrees of the II and III Plenary Councils of Baltimore referring to the Instruction.

ceived according to the manner described in the Instruction of the Holy Office of the year 1859, which is to be seen in the Appendix of the II Plenary Council of Baltimore and in most ritual books.[24]

In the Addenda of the Roman Ritual for the use of the clergy of the United States the formula of absolution from the censure of excommunication coincides exactly with that set forth in the Instruction.[25] In the smaller ritual the entire Instruction is included.[26] Thus, additional weight is given to the obligation to observe the procedure outlined in the Instruction.

A practical difficulty arises, however, from a comparison of canon 2314, § 2, with the Instruction. The Instruction requires that the abjuration and profession of faith be made in the presence of the priest, without reference to witnesses, whereas canon 2314, § 2, expressly demands the presence of at least two witnesses in order that the abjuration have juridic value in the external forum. If, as MacKenzie maintains, the Holy Office "in granting the priests of the United States the use of this simple method of reconciling converts, was in reality granting a privilege,"[27] then such a practice may still be employed in virtue of canon 4, which safeguards the continuance of privileges granted by the Holy See before the promulgation of the Code, if they were still in use and were not revoked with the advent of the Code. The wording of the response of the Holy Office, however, does not substantiate this interpretation.

[24] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A. D. MDCCCLXXXIV* (Baltimorae: Typis Joannis Murphy Et Sociorum, 1886), n. 122: "Ut sua igitur Baptismo debita servetur veneratio, atque quam longissime absit vel sola apparentia repetitionis ejus illegitimae, praecipit Ecclesia ut quando quis ab errore ad fidem convertitur, semper diligens fiat investigatio num antea baptizatus fuerit, numque validus fuerit Baptismus in haeresi susceptus. Neque sufficit investigatio mere generalis de consuetudine vel praxi aliquarum sectarum, per quam haberi posset praesumptio de collato vel non collato Baptismo aut de ejus validitate vel nullitate; sed, quantum possibile fuerit, inquirendum est in singulorum neophytorum Baptismum, ut obtineatur, qualis in casu haberi queat, vel certitudo vel probabilitas, eos fuisse vel non fuisse valide baptizatus. Facta investigatione, recipiendus erit neo-conversus juxta modum descriptum in Instructione S. Officii anni 1859 quam videre est in calce Conc. Balt. Plen. II., et in libris Ritualibus communiter."

[25] *Forma Receptionis Neo-Conversi.*

[26] *The Priest's New Ritual* compiled by Rev. Paul Griffiith (revised edition, Baltimore, Md.: John Murphy Company, 1940), pp. 48-60.

[27] *The Delict of Heresy,* p. 116.

In the first place the Holy Office did not address the Instruction to the priests of the United States, but to the Bishop of Philadelphia. Secondly, there is no question of the granting of a privilege.

The Holy Office was rather rendering an interpretation of the general law of the Church in a particular case of doubt as to the application or fulfillment of the general law. This is evident from the words, *Proposito dubio R.P.D. Episcopi Philadelphien. circa Professionem Fidei, ac Absolutionem haereticorum dum convertuntur.* The Bishop of Philadelphia was not seeking a privilege, but rather requested a clarification of the law which required converts to make a profession of faith and to be absolved from the censure of excommunication. His doubt as to the application of the law was settled by an official interpretation: *Emi D.D. decreverunt dandam esse instructionem.* The Holy Office in the Instruction applied the prescriptions of the general law and formulated them into a workable procedure.

The Councils of Baltimore extended the prescriptions of the Instruction to every diocese in the United States. With the promulgation of the Code, however, all laws, whether universal or particular, which were opposed to the prescriptions of the Code were immediately and automatically abrogated, unless special provision for their continuance was made by the Code.[28] Since the Instruction had assumed the status of particular law and since this particular law in prescribing merely the presence of the priest for the juridic efficacy of the abjuration was opposed to the provisions of the Code, the practice of receiving the convert's abjuration and profession of faith in the presence of only the priest is abrogated, and the prescriptions of canon 2314, § 2, must be observed. Therefore, while the other prescriptions of the Instruction remain in force as particular law for the United States, the abjuration of heresy and profession of faith must take place in the presence of the bishop or his delegate and two witnesses.[29]

Another difficulty arises by reason of the new formula of profession of faith which was approved by the Holy Office and sent to the Ordinaries of the United States by His Excellency, the Most Reverend Amleto G. Cicognani, Apostolic Delegate, under date of March 26, 1942. Does the more recent formula abrogate the use of the profession of faith which is contained in the Instruction? It seems

[28] Canon 6, 1°.

[29] Cf. *AER,* LXXXVII (1932), 530.

that the approval given the new formula by the Holy Office acting in the name of the Holy See [30] is sufficient to warrant the abrogation of the formula of the Instruction, just as the Holy Office in the Instruction abrogated the use of the formula of Pius IV. This conclusion seems warranted, whether the formula of the Instruction be considered either as particular law (by reason of the decrees of the Councils of Baltimore which commanded the observance of the Instruction), or as a mere addition to the particular law of the United States (by interpreting the decrees of the Councils of Baltimore as referring only to the manner of procedure and not to the formula for the profession of faith or the prayers and formula for absolution). If in issuing the new formula, the Holy See intended that it be considered as particular law for the United States, this new law certainly abrogated the formula contained in the Instruction; if the law of the Councils of Baltimore is, on the other hand, considered as not embracing the formula in the Instruction, the mere approval of the new formula by the Holy See and its promulgation by the Apostolic Delegate to all the Ordinaries of the United States with the command that it be used is sufficient to supplant the use of the formula in the Instruction.

While the two formulas are essentially the same, the more recent formula is more detailed concerning certain truths and does not follow the same order.

Instruction Formula	1942 Formula
1. I, N.N., having before my eyes the holy Gospels, which I touch with my hand, and knowing that no one can be saved without that faith which the Holy Catholic Apostolic Roman Church holds, believes, and teaches, against which I grieve that I have greatly erred, inasmuch as I have held and believed doctrines opposed to her teaching.	1. I ..... years of age, born outside the Catholic Church, have held and believed errors contrary to her teaching. Now, enlightened by divine grace, I kneel before you, Reverend Father ..... having before by eyes and touching with my hands the Holy Gospels; and with a firm faith I believe and profess each and all the articles that are contained in the Apostles' Creed; that is: I believe in God, the Father Almighty, Creator of Heaven and Earth; and in Jesus Christ, His only Son, our Lord, Who was conceived by the
2. I now with grief and contrition for my past errors, profess that I believe the Holy Catholic Apostolic Roman Church to be the only and true Church estab-	

[30] Canon 7.

lished on earth by Jesus Christ, to which I submit myself with my whole heart. I believe all the articles that she proposes to my belief, and I reject and condemn all that she rejects and condemns, and I am ready to observe all that she commands me. And especially, I profess that I believe:

3. One only God in three divine Persons, distinct from, and equal to, each other—that is to say, the Father, the Son, and the Holy Ghost;

4. The Catholic doctrine of the Incarnation, Passion, Death, and Resurrection of our Lord Jesus Christ; and the personal union of the two Natures, the divine and the human; the divine Maternity of the most holy Mary, together with her most spotless Virginity;

10. The authority of the Apostolic and Ecclesiastical Traditions, and of the Holy Scriptures, which we must interpret, and understand only in the sense which our holy mother the Catholic Church has held, and does hold;

6. The seven Sacraments instituted by Jesus Christ for the salvation of mankind; that is to say, Baptism, Confirmation, Eucharist, Penance, Extreme Unction, Order, Matrimony;

Holy Ghost, born of the Virgin Mary, suffered under Pontius Pilate, was crucified, died and was buried; He descended into hell, the third day He rose again from the dead; He ascended into heaven and sitteth at the right hand of God, the Father Almighty; from thence He will come to judge the living and the dead. I believe in the Holy Ghost; the Holy Catholic Church; the communion of saints; the forgiveness of sins; the resurrection of the body, and life everlasting. Amen.

2. I admit and embrace most firmly the apostolic and ecclesiastical traditions and all the other constitutions and prescriptions of the Church.

3. I admit the Sacred Scriptures according to the sense which has been held and which is still held by Holy Mother Church, whose duty it is to judge the true sense and interpretation of the Sacred Scriptures, and I shall never accept or interpret them except according to the unanimous consent of the Fathers.

4. I profess that the Sacraments of the New Law are, truly and precisely seven in number, instituted for the salvation of mankind, though all are not necessary [31] for each individual: Baptism, Confirmation, Eucharist, Penance, Extreme Unction,

[31] "Though not all are necessary" is suggested as more in keeping with the doctrine of the Church.

Holy Orders, and Matrimony. I profess that all confer grace and that of these Baptism, Confirmation and Holy Orders cannot be repeated without sacrilege.

5. I also accept and admit the ritual of the Catholic Church in the solemn administration of all the above mentioned Sacraments.

5. The true, real, and substantial presence of the Body, together with the Soul and Divinity of our Lord Jesus Christ, in the most holy Sacrament of the Eucharist;

6. I accept and hold, in each and every part, all that has been defined and declared by the Sacred Council of Trent concerning Original Sin and Justification. I profess that in the Mass is offered to God a true, real and propitiatory sacrifice for the living and the dead; that in the Holy Sacrament of the Eucharist is really, truly and substantially the Body and Blood together with the soul and Divinity of our Lord Jesus Christ, and that there takes place what the Church calls transubstantiation, that is the change of all the substance of bread into the Body and of all substance of wine into the Blood. I confess also that in receiving under either of these species one receives Jesus Christ, whole and entire.

7. Purgatory, the Resurrection of the dead, Everlasting life;

9. The veneration of the Saints, and of their images;

7. I firmly hold that Purgatory exists and that the souls detained there can be helped by the prayers of the faithful. Likewise I hold that the saints, who reign with Jesus Christ, should be venerated and invoked, that they offer prayers to God for us and that their relics are to be venerated.

8. The Primacy, not only of honor, but also of jurisdiction of the Roman Pontiff, successor of St. Peter, Prince of the Apostles, Vicar of Jesus Christ;

8. I profess firmly that the images of Jesus Christ and of the Mother of God, ever Virgin, as well as of all the saints should be given due honor and venera-

tion. I also affirm that Jesus Christ left to the Church the faculty to grant Indulgences and that their use is most salutary to the Christian people. I recognize the Holy Roman, Catholic and Apostolic Church as the mother and teacher of all the Churches and I promise and swear true obedience to the Roman Pontiff, successor of St. Peter, Prince of the Apostles, and Vicar of Jesus Christ.

11. And everything else, that has been defined, and declared by the sacred Canons, and by the General Councils, especially by the Holy Council of Trent.

9. Besides I accept, without hesitation, and profess all that has been handed down, defined and declared by the Sacred Canons and by the general Councils, especially by the Sacred Council of Trent and by the Vatican General Council, and in a special manner concerning the primacy and infallibility of the Roman Pontiff. At the same time I condemn and reprove all that the Church has condemned and reproved. This same Catholic Faith, outside of which nobody can be saved, which I now freely profess and to which I truly adhere, the same I promise and swear to maintain and profess, with the help of God, entire, inviolate and with firm constancy until the last breath of life; and I shall strive, as far as possible, that this same faith shall be held, taught and publicly professed by all those who depend on me and by those of whom I shall have charge.

12. With a sincere heart, therefore, and with unfeigned faith, I detest and abjure every error, heresy, and sect opposed to the said Holy Catholic and Apostolic Roman Church. So help me God, and these His holy Gospels, which I touch with my hand!

So help me God and these Holy Gospels.[32]

[32] The Instruction Formula is to be found in the *Acta et Decreta*, Appendix I, pp. 278-279 of the II Plenary Council of Baltimore. The 1942 Formula may be found in Bouscaren, *Canon Law Digest* (2 vols., Milwaukee: Bruce Publishing Company, 1934-1943), II, pp. 182-184; THE JURIST, II. (1942), 305-307; *AER, CVI* (1942), 355-357; *Conference Bulletin of the Archdiocese of New York,* XIX (1942), 60-61.

NON-CATHOLIC PETITIONERS AND PLAINTIFFS

In the celebrated response of January 27, 1928,[1] the Holy Office reserved to itself not only the right to admit non-Catholics as plaintiffs, but also exclusive competence in all cases brought to the Holy See involving a mixed marriage, excepting those mentioned in Canon 1557, § 1, 1°, that is cases of political rulers, their children, and of those enjoying the right of succession, which are reserved to the Holy Father. The decree mentions Canon 247, § 3, as at least a partial basis for the reservation of this competence, and justifiably so, since that prescription confers this exclusive competence over matters that even indirectly involve the impediments of mixed religion or disparity of worship.

In virtue of this decree, marriage cases involving a non-Catholic are all reserved to the Holy Office, except those excluded in the response of 1928, i. e., those of political rulers, their children, and of those enjoying the right of succession, and cases that need not be presented to the Holy See provided that the petitioner is a Catholic or the Promoter of Justice.[2] In every such case, of course, there exists the possibility of appeal to the Holy See in second or third instance, and in such an event the reservation would assert itself.

Petitions for a dissolution of a *legitimate* marriage *in favorem fidei* and for a dispensation *super matrimonio rato et non-consummato* might be regarded as not falling within the term *causae,* if this term were to be strictly understood as referring only to judicial trials, so that only the latter would be reserved. As to the former, however, Canon 247, § 3, offers adequate authority for the exclusive competence of the Holy Office in the case of a merely *legitimate* marriage. Moreover, Canon 1962 applies the term *causae* both to cases of Pauline Privilege and to petitions for a dispensation *super matrimonio rato et non-consummato.* In using the term, *causae,* then, the response of 1928 must be regarded as employing it in a wide sense.

It follows, then, that a petition for a dissolution of a legitimate marriage *in favorem fidei* pertains always to the exclusive compe-

[1] *AAS,* XX (1928), 75; Art. 12, 35, § 3—Instr. S.C. de Disc. Sacramentorum, *Provida—AAS,* XXVIII (1936), 313-361; Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: Bruce, 1938), pp. 82-86.

[2] Art. 12, Instr. *Provida.*

tence of the Holy Office, not because the petitioner is a non-Catholic, because he must be a Catholic in order to ask for the favor, but because the marriage is merely *legitimate*. On the other hand a petition for a dispensation *super matrimonio rato et non-consummato* may not be reserved to the Holy Office at all or it may be reserved on one count or on two counts. If the parties to the marriage are both Catholic and the petitioner has not apostatized at the time of presenting the petition, the Sacred Congregation of the Sacraments enjoys competence. But in the case of a mixed marriage, even when the petitioner is the Catholic party, the permission for the instruction of the process may be granted only by the Holy Office. If the petitioner is the non-Catholic party, then the case is reserved to the Holy Office on two counts. The distinction between the latter two types of cases reserved to the Holy Office is emphasized, while a greater reticence in the case of non-Catholic petitioners is also evidenced, in the faculty which the Most Reverend Apostolic Delegate enjoys through the grace of the Holy Office of permitting the instruction of cases involving petitions for a dispensation *super matrimonio rato et non-consummato*. While the faculty from the Sacred Congregation of the Sacraments containing a similar authorization could contemplate only Catholic marriages and Catholic petitioners, the faculty from the Holy Office could contemplate two situations: a mixed marriage and a Catholic petitioner or a mixed marriage and a non-Catholic petitioner. Rather than extending to the latter case so as to include the situation where the petitioner would be a non-Catholic it restricts itself to the former situation.[3]

The case might be envisioned in which a convert to the Church seeks a dispensation from the bond of a Sacramental non-consummated marriage contracted with a non-Catholic spouse while the petitioner was a non-Catholic. Is this case reserved to the Holy Office? If it is, does the faculty enjoyed by the Most Reverend Apostolic Delegate extend to it?

Here there is no case of a merely *legitimate* marriage or of a mixed marriage. At the same time, the petitioner is a Catholic. Further, no impediment of mixed religion exists *de facto* since the marriage was not a mixed marriage when it was validly celebrated.

[3] That it is so restricted is beyond doubt as a communication from the Most Reverend Apostolic Delegate affirms. Thus a statement in regard to this faculty appearing in a previous issue is obviously too broad (cf. THE JURIST, III [1943], 503).

While this case can technically be distinguished from those reserved in Canon 247, § 3 and in the response of 1928, it seems that it was the mind of the Holy Office to reserve it. The faculty enjoyed by the Most Reverend Apostolic Delegate, since it would seem to contemplate cases of mixed marriage, should probably be held as not comprehending this case.

A problem old and new in regard to non-Catholic petitioners and plaintiffs is perhaps solved by the interpretation handed down on December 6, 1943, by the Pontifical Commission for the Authentic Interpretation of the Canons of the Code, definitely affirming that the summary process of Canon 1990 is a judicial process and not an administrative one.[4] In his treatise on *Canonical Procedure in Matrimonial Cases*, Doheny very briefly states that the summary cases enumerated in Canon 1990 are not included in the restrictions placed by the response of the Holy Office of January 27, 1928.[5] But in a paper read at the Regional Meetings of The Canon Law Society of America in Washington on May 16, 1943, and in New York on May 19, 1943, later appearing in The Jurist, he espoused the view that these proceedings are strictly judicial, and that as a logical consequence non-Catholic petitioners can not be admitted without permission of the Holy Office.[6] The recent response of the Pontifical Commission bears out the contention that the process is judicial, even though the Rota in a decision of 1931 stated that it is manifestly an administrative process.[7]

[4] *AAS*, XXXVI (1944), 94. Other interpretations given at the same time affirm that the "excepted cases" of Canon 1990 are listed there *taxative;* that the word "*Ordinarius*" of that Canon does not include the Vicar General even *de speciali mandato;* and that in Canons 1991 and 1992, the Official is to be understood as well as the Bishop under the terms "*iudex secundae instantiae*" Cf. The Jurist, IV (1944), 627, 628.

[5] *Op. cit.*, p. 83.

[6] Cf. The Jurist, IV (1944), 4-7, 33, 34.

[7] *S.R. Rotae Dec.*, XXIII (1931), 252, n. 5 (Wynen, Heard, Janasik). Doheny refers to this decision in his paper, but not to agree with it. He also cites Gasparri (*De Matrimonio*, II, n. 1260) as holding that the restriction of the reply of 1928 extends only to formal trials and not to summary cases, and a reply of the Holy Office to the Bishop of Harrisburg of April 20, 1931, seeming to sustain this opinion—cf. Bouscaren, *The Canon Law Digest*, II (Milwaukee: Bruce, 1943), 552. Doheny points out that the latter response is only a private one.

The problem, then, is whether one should follow Doheny in his logical deduction that since the summary process is a judicial process, non-Catholic petitioners are really plaintiffs in the strict sense, i. e., they can not present their *libellus* without permission of the Holy Office, necessary that *"actoris partes agere" possint*, in the language of the reply of the Holy Office of 1928.

The answer seems to depend upon the *praxis Curiae*. Of course, the Pontifical Commission enjoys independence of the Rota, so that one can not speak of a change in the *praxis Curiae* when the Pontifical Commission interprets a Canon otherwise than a *turnus* of the Rota interpreted it. Obviously, since the Pontifical Commission is the authorized agency for the interpretation of the Code, the Rota will be bound by the present interpretation which regards the summary process as a judicial one.

But granted this, is the private response to the Bishop of Harrisburg and the view of Gasparri, who obviously was most intimately aware of the *praxis Curiae*, as well as the view of the Rota, to be considered overruled by this recent interpretation? One is inclined to admit that such is the case. Inexorable logic would surely leave no alternative. Obviously, if a change has occurred, it is in the opinion of canonists and not in the authentic interpretation of the law.

JEROME D. HANNAN

Decrees and Decisions

CANONICAL

PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS

RESPONSA AD PROPOSITA DUBIA [1]

EMI PATRES PONTIFICAE COMMISSIONIS AD CODICIS CANONES AUTHENTICE INTERPRETANDOS, PROPOSITIS IN PLENARIO COETU QUAE SEQUUNTUR DUBIIS, RESPONDERI MANDARUNT UT INFRA AD SINGULA:

I. DE DENUNTIATIONE NULLITATIS MATRIMONII

D. An coniuges inhabiles ad accusandum matrimonium qui, iuxta canonem 1971 § 2 et interpretationem diei 17 Februarii 1930, ius exercere velint denuntiandi nullitatem matrimonii, teneantur adire Ordinarium vel promotorem iustitiae tribunalis competentis ad videndum de causa nullitatis sui matrimonii ad normam canonis 1964, an possint etiam adire alium Ordinarium vel alium promotorem iustitiae.

R. Affirmative ad primam partem, negative ad secundam.

II. DE DECLARATIONE NULLITATIS MATRIMONII

D. I. Utrum *casus excepti* canonis 1990 sint taxative, an demonstrative enunciati.

II. Utrum processus, de quo in canone 1990, sit ordinis iudicialis, an administrativi.

III. An nomine *Ordinarii,* de quo in canone 1990, veniat Vicarius generalis, saltem de speciali mandato Episcopi.

IV. Utrum sub verbis: *iudex secundae instantiae,* de quibus in canonibus 1991 et 1992, veniat tantum Episcopus, an etiam Officialis.

[1] *Acta Apostolicae Sedis,* XXXVI (1944), 94.

R. Ad I et II. Affirmative ad primam partem, negative ad secundam.

Ad III. Negative.

Ad IV. Negative ad primam partem, affirmative ad secundam.

Datum Romae, e Civitate Vaticana, die 6 mensis Decembris, a. 1943.

M. Card. Massimi, *Praeses.*

L. * S. I. Bruno, *Secretarius.*

SUPREMA SACRA CONGREGATIO S. OFFICII [1]

Decretum

De Finibus Matrimonii

De matrimonii finibus eorumque relatione et ordine his postremis annis nonnulla typis edita prodierunt, quae vel asserunt finem primarium matrimonii non esse prolis generationem, vel fines secundarios non esse fini primario subordinatos, sed ab ea independentes.

Hisce in elucubrationibus primarius coniugii finis alius ab aliis designatur, ut ex gr.: coniugum per omnimodam vitae actionisque communionem complementum ac personalis perfectio; coniugum mutuus amor atque unio fovenda ac perficienda per physicam et somaticam propriae personae traditionem, et huiusmodi alia plura.

In iisdem scriptis interdum, verbis in documentis Ecclesiae occurrentibus (uti sunt v. gr. *finis*, *primarius*, *secundarius*) sensus tribuitur qui cum his vocibus, secundum communem theologorum usum, non congruit.

Novatus hic cogitandi et loquendi modus natus est ad errores et incertitudines fovendas; quibus avertendis prospicientes Emi ac Revmi Patres huius Supremae Sacrae Congregationis, rebus fidei et morum tutandis praepositi, in consessu plenario feriae IV, die 29 Martii 1944 habito, proposito sibi dubio: "An admitti possit quorumdam recentiorum sententia, qui vel negant finem primarium matrimonii esse prolis generationem et educationem, vel docent fines secundarios fini primario non esse essentialiter subordinatos, sed esse aeque principales et independentes", respondendum decreverunt: *Negative.*

[1] *AAS*, XXXVI (1944), 103.

Et in audientia, feria V, die 30 eiusdem mensis et anni, Exmo ac Revmo Domino Adsessori Sancti Officii impertita, SSmus D. N. D. Pius, divina Providentia Papa XII, de omnibus habita relatione, praesens decretum adprobare dignatus est, ac publici iuris fieri iussit.

Datum Romae, ex Aedibus Sancti Officii, die 1 Aprilis 1944.

I. Pepe, *Supr. S. Cong.*
S. Officii Notarius

SACRA CONGREGATIO RITUUM

Decretum [1]

de usu salivae in administratione baptisimi

Quanta cura ac vigilantia Catholica Ecclesia ritus et caeremonias in sacrosancto Missae sacrificio ac Sacramentorum administratione, apostolicis traditionibus sanctorumque Patrum decretis constituta, observare studuerit, compertum est e constanti sollicitudine qua liturgicos libros ediderit, et ubique fideliter servandos constituerit. Ipsa insuper sacra Tridentina Synodus (Sess. VII, cap. XIII) de his ritibus decrevit in haec verba: "Si quis dixerit receptos et approbatos Ecclesiae Catholicae ritus in solemni Sacramentorum administratione adhiberi consuetos, aut contemni, aut sine peccato a ministris pro libito omitti, aut in novos alios per quemcumque ecclesiarum pastorem mutari posse, anathema sit." Haec autem minime officiunt quominus, ubicumque gravis ratio suadeat, ritus aut caeremoniae a competenti auctoritate mutari possint, ne fideles a Sacramentorum susceptione alienentur. Quum vero plures Sacrorum Antistes, sacerdotes et missionales notum fecerint quandoque in administratione Baptismi tam parvulorum quam adultorum contagionis adesse periculum aures naresque baptizandorum saliva oris sui tangendo, Sacra Rituum Congregatio, de mandato Sanctissimi Domini Nostri Pii Papae XII, rubricam Ritualis Romani Tit. II, cap. II, n. 13 ita reformandam decrevit: "Postea sacerdos pollice accipit de saliva oris sui (quod omittitur quotiescumque rationabilis adest causa munditiei tuendae aut periculum morbi contrahendi vel propagandi) et tangit aures et nares infantis . . ." et in futuris

[1] *Acta Apostolicae Sedis*, XXXVI (1944), 28.

eiusdem Ritualis Romani editionibus inserendam mandavit. Quibuscumque contrariis non obstantibus.

Die 14 Ianuarii 1944.

✠ C. Card. Salotti, *Ep. Praen., Praefectus.*

L. * S. A. Carinci, *Secretarius.*

SACRA CONGREGATIO RITUUM

Decretum [1]

De Sacris Oleis Anno MCMXLIII Confectis

Cum in tanta rerum publicarum perturbatione, variis de causis, pluribus in locis olivarum oleum ad Sacrum Chrisma, Catechumenorum atque Infirmorum Oleum conficiendum, congrua quantitate vix haberi possit, Sacra Rituum Congregatio huic difficultati, meliori quo fieri potest modo, occurrere volens, statuit, ut in dioecesibus, ubi novum oleum debita quantitate comparari nequeat, confectis de more ab Episcopis Feria V in Coena Domini, iuxta Pontificale Romanum inter Missarum solemnia Sacris Oleis, vetus Chrisma et Catechumenorum atque Infirmorum Oleum non comburatur, sed Sacri Ministri eodem usque ad consummationem uti pergant, quo exhausto, nova Sacra Olea adhibeant. Praesens autem indultum hoc dumtaxat anno valiturum declarat.

Contrariis quibuscumque non obstantibus.

Die 28 Ianuarii 1944.

✠ C. Card. Salotti, *Ep. Praen., Praefectus.*

L. * S. A. Carinci, *Secretarius.*

SACRA CONGREGATIO CONCILII

Romana [1]

Reservationis Beneficiorum in Urbe

Die 12 Iunii 1943

dubium.—Cum ortum sit dubium cuinam spectet vacantes canonicatus conferre in Titulis et Diaconiis, dum eorum Cardinales Titu-

[1] *Acta Apostolicae Sedis,* XXXVI (1944), 60.

[1] *Acta Apostolicae Sedis,* XXXV (1943), 399.

lares ab Urbe absunt, *utrum nempe iisdem Cardinalibus Titularibus et Diaconis an Datariae Apostolicae,* dubium ipsum, de speciali mandato SSmi Domini, delatum est solvendum huic Sacrae Congregationi Concilii.

ANIMADVERSIONES.—In canone 1435, § 3 expresse edicitur: "Quod attinet ad collationem beneficiorum quae Romae fundata sint, leges peculiares de eisdem vigentes serventur". Iamvero hae leges in primis continentur in Regulis Cancellariae Apostolicae et praesertim, quod ad rem nostram attinet, in Regula VIII quae statuit: "Item (Sanctitas Sua) reservavit dispositioni Suae . . . collationem, provisionem seu quamvis aliam dispositionem S.R.E. Cardinalium a Romana Curia absentium ratione suorum Episcopatuum Cardinalatus, ac ipsorum Cardinalium Titulorum et Diaconiarum, quamdiu absentia huiusmodi duraverit . . ."

Quapropter ius quod Summus Pontifex, veluti Episcopus Romanus, Emis Cardinalibus concessit conferendi beneficia in suis Titulis vel Diaconiis hac conditione circumscribitur ut sint praesentes in Urbe. Hinc Riganti (*Comment. in Reg. VIII,* § 1, n. 27-29) scribit: "Licet Cardinales in suis Titulis iurisdictione episcopali seu quasi fruantur, ut sancivit Honorius III, proindeque de iure conferre possint beneficia in iisdem Titulis vacantia, habeantque in illorum collatione fundatam intentionem", attamen in hoc mandato Pontifex "non intelligit comprehendere collationem beneficiorum nisi cum dicta qualitate *praesentiae* in Romana Curia."

Quae praesentia debet esse realis et personalis, non ficta, fallente in casu regula iuris 68 in VI: "Potest quis per alium quod potest facere per se ipsum", nam, ut ait Reiffenstuel (Reg. 68, vol. 6, n. 9): "fallit regula in iis quae ex ipsa natura et institutione sua vel speciali iuris dispositione factum propriae personae requirunt, ut sunt residentia . . ."

Nec aliter auctores magnae notae hanc Regulam VIII Cancellariae Apostolicae interpretati sunt, inter quos, praeter memoratum Riganti, recensendi sunt Lotterius (*De re beneficiali,* lib. II, quaest. 2), Fagnanus et Gonzalez (*Commentarium ad Reg. VIII*), Cardinalis De Luca (*De beneficiis,* disc. 145, n. 14) aliique.

Verum quidem est quod Regulae Cancellariae Apostolicae, qua tales, abrogatae sunt per Codicem iuris canonici. Attamen Codex plures earumdem Regularum dispositiones servavit, inter quas certo recensendae sunt quae respiciunt collationem et reservationem beneficiorum in Urbe vacantium dum Cardinales Titulares vel Diaconi a Romana Curia absunt, cum huiusmodi dispositiones constituant

illas *leges peculiares antea vigentes,* quas ipse Codex in memorata canone 1435 § 3 praescribit ut serventur. Interpretatio autem huius canonis, ad normam canonis 6 n. 2 Codicis, desumenda est " ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus," quae supra relatae sunt.

Idipsum confirmatur praxi Datariae Apostolicae, quae Regulam VIII etiam post Codicem promulgatum servavit uti normam in collatione horum beneficiorum; quae praxis est optima iuris interpres in casu, ad normam canonis 20 Codicis iuris canonici.

Cui expositae doctrinae et praxi Datariae Apostolicae non adversatur praescriptum canonis 1432 § 1, vi cuius " ad collationem beneficiorum vacantium Cardinalis in proprio titulo vel diaconia et Ordinarius loci in proprio territorio habet intentionem in iure fundatam". Nam ex hac clausula " intentio in iure fundata " hoc tantum eruere licet quod Cardinales et Ordinarii locorum, vi iuris communis, ius habent beneficia conferendi in suis titulis vel in suo territorio, exclusis aliis collatoribus inferioribus, nisi aliter constet, immo et ipso Summo Pontifice, nisi caveatur. Verum aliud expresse cavetur, tamquam exceptio huic regulae generali, in Codice I.C. per canonem 1435 § 1 quoad omnes dignitates, familiares Papae, beneficia affecta etc., et per § 3 eiusdem canonis quoad beneficia Romae fundata.

Resolutio.—Proposito itaque in Congregatione Plenaria diei 12 Iunii 1943 dubio: *An, ad normam canonis 1435 § 3 Codicis I.C., sit Sanctae Sedi reservata collatio beneficiorum vacantium in Titulis vel Diaconiis dum Cardinales Titulares a Romana Curia absunt;* Emi Patres eiusdem Sacrae Congregationis responderunt: *Affirmative.*

Quam resolutionem SSmus D.N. Pius Pp. XII in Audientia diei 18 eiusdem mensis, referente subscripto Secretario, approbare et confirmare dignatus est.

I. Bruno, *Secretarius.*

SECULAR

RECENT DECISIONS AFFECTING LIABILITY OF CHARITY FOR DAMAGES DUE TO NEGLIGENCE

President and Directors of Georgetown College v. Hughes, 130 F. (2) 810 (1942), affirming *Hughes v. President and Directors of Georgetown College,* 33 F. Supp. 867 (D.C.) A special nurse sued

the hospital for injuries sustained when a swinging door was violently pushed by a student nurse while hurrying. The question of the negligence of the hospital was held to be one for the jury, as also the question of the contributory negligence of the plaintiff in walking too close to the door or in failing to take due care regarding it with full knowledge of the danger involved. Judgment for the plaintiff was affirmed unanimously on appeal. Appeal court was equally divided, however, on the question of the defendant charity's liability. Three judges were of the opinion that the plaintiff was entitled to recovery because she was a stranger to the charity, while three other judges believed that a charitable institution is liable for the negligent acts of its servants just as other persons and corporations are.

Martucci v. Brooklyn Children's Aid Society, 133 F. (2) 252 (1943), 140 F. (2) 732 (1944) (N.Y.) Suit was entered against hospital for injuries sustained by an infant patient as a result of cutting his head when he fell against a window while struggling with another patient. Under New York law, a hospital is held liable for the negligence of its servants or agents at least insofar as such negligence is not connected with actual medical treatment given by physicians and nurses who have been selected with reasonable care. The hospital owed a duty to the infant patient and to patient's father to provide safe quarters, but it was not an insurer of the safety of the inmates. It was a question for the jury to decide whether the hospital had performed its duty to exercise reasonable care in providing safe quarters when it left the glass in the window unguarded.

Goldman v. Winkelstein, 32 N.Y.S. (2) 949, 263 App. Div. 958 (1942). A charitable institution is not exempt from the rule of *respondeat superior* in the event of an injury to a beneficiary occasioned by the negligence of its servant or employee.

Abbott v. New York Public Library, 32 N.Y.S. (2) 963, 263 App. Div. 314 (1942). A visitor to the public library was attacked without cause and received serious injuries inflicted by a hatchet used by another invitee who three days previously in the same library had made a wholly unjustifiable assault with a dangerous knife on another visitor. The library had knowledge of this previous assault and further knowledge of threats made by the assailant. It allowed him to go at large without notifying the police. Moreover, it knew

of his presence in the library at the time of the later assault, since he had signed the register. The visitor assaulted was not a bare licensee, but an invitee, inasmuch as the library was maintained and operated for the use of the general public to furnish educational and recreational facilities. The library owed this invitee the duty of reasonable care to keep the premises reasonably safe, and this included the duty to supervise it adequately so that persons lawfully using it would not be unreasonably exposed to danger, though it was not an insurer of their safety. The question of whether the library was negligent in this duty was for the jury to decide.

Waltman v. New York University, 35 N.Y.S. (2) 892, 264 App. Div. 907 (1942). The university could not escape liability to a student for injuries sustained through university's alleged defective equipment and its failure to supply proper safeguards.

Lainen v. Tonsil Hospital, 36 N.Y.S. (2) 55 (N.Y. Sup.) (1942). A charitable hospital was not exempt from responsibility for the negligence of its servants acting in an administrative capacity.

Heineman v. Jewish Agr. Soc., 37 N.Y.S. (2) 354, 178 Misc. 897 (N.Y. Sup.) (1942). A corporation whose purpose was to provide instruction in farming to Jewish residents of the United States, including refugees from Europe and to supply them with the means of becoming farmers, was charitable in its purpose even if conducted without loss, and the mere fact that the plaintiff, beneficiary of the charitable purpose, paid five dollars weekly for board while staying on the farm owned by the corporation, a sum inadequate to pay for the actual service, did not prevent his being the beneficiary of the charitable corporation. On the other hand, the agreement inserted in his application that he would not hold the charitable corporation responsible for any damage suffered in the ordinary conduct of the farm did not operate as a bar to the liability of the corporation for injuries sustained by him through the negligence of an employee of the corporation when the accident did not occur in the ordinary conduct of the farm. His presence on the station wagon of the corporation was that of an invitee. He had called at the office of the corporation and had been directed to the vice president as the proper person with whom to transact business. He was therefore entitled to believe that the vice president possessed the necessary authority to invite him to ride on the defendant's station wagon for the purpose of purchasing necessary clothing. If the vice president

actually lacked this authority, it was the burden of the corporation to establish this fact. The relationship between the plaintiff and the corporation grew out of a contract made in New York, while the accident occurred in New Jersey. Under the law of New Jersey a charitable corporation is in general not liable to beneficiaries of its charity for the negligence of its servants. Under the law of New York, on the other hand, a charitable corporation enjoys no immunity in this respect. In New Jersey, the waiver theory obtains. It is conceived that the plaintiff by accepting the benefits of the charity implicitly agrees not to deplete the funds of the charity by claims for damages arising out of the charitable activity of which he is the beneficiary. Inasmuch as the corporation had not obtained permission from New Jersey to exercise its corporate franchise therein, the New York law governed the case, and the corporation was not exempt from liability.

Lee v. Glens Falls Hospital, 42 N.Y.S. (2) 169, 266 App. Div. 607 (1943). The fact that a hospital received compensation from patient plaintiff did not affect its eleemosynary character or its liability as a public charity. A hospital which is a charitable institution is liable for the negligence of its mere servants or agents but not for that of persons considered to be independent contractors, such as physicians and nurses, if the hospital has exercised reasonable care in their selection and retention, and the doctrine of *respondeat superior* can not be invoked as to them. For the relation of the hospital to them is not that of master and servant, since the hospital merely procures physicians to act on their own responsibility, and nurses to carry out the orders of the physicians. In this case, a paying patient became irrational and was placed in a solarium where she was the sole patient. The hospital provided competent nurses and followed the instructions of the physician, who informed the night supervisor that the patient should be watched closely but did not order a special nurse to be assigned to the case. The patient fell from her bed on which the side boards were up, during the absence of nurses who had decided that the patient could be left alone for a short time. The hospital was not negligent and was not liable for the injuries sustained.

Fields v. Mountainside Hospital, 35 A. (2) 701, 22 N.J. Misc. 72 (1943). A patient injured when a Balkan frame broke was not permitted to recover from the hospital on the ground of an alleged

breach of alleged expressed or implied contract that the hospital would use good and proper apparatus and equipment and would use care in its maintenance. There was no liability on contract in such a case when there was no liability in tort. To permit recovery was held to be contrary to public policy. The fact that the hospital carried insurance against liability was held immaterial. The hospital would be liable only if it failed to use due care in furnishing the equipment or the apparatus or in selecting and employing competent and efficient servants and agents, exclusive of doctors and nurses, whose duty it was to inspect, repair and maintain such equipment.

Sandwell v. Elliott Hospital, 24 A. (2) 273 (N.H.) (1942). The hospital was sued for injuries sustained in a fall on ice on the hospital drive. The liability of the hospital in not sanding the drive was dependent upon whether it owed the plaintiff that duty by reason of its relationship to him. Whether a visitor of a patient is a licensee or an invitee depends upon the mutual benefit of the visit to him and to the hospital, but the mere incidental benefit resulting to the hospital from the social call on the patient does not make the caller an invitee. Since he was a mere gratuitous licensee, the hospital owed him no duty except to warn him of dangers of which it actually knew and which were not open to the ordinary observation of the visitor. Here the danger was fully open to his observation, and there was no recovery allowed.

Edwards v. Grace Hospital Soc., 36 A. (2) 273 (Conn.) (1944). A charitable corporation operating a hospital is not liable for the negligence of the employees which it has selected with due care. It is not sufficient to warrant a finding that the hospital was being operated negligently by the corporation to offer evidence that the nurses were inattentive or improperly allocated, if it is not established that at the time the patient, recovering from an appendectomy, jumped out of a window, there was an inadequate number of nurses on duty and that this inadequacy was the cause of the patient's death. The hospital could not be held guilty of negligence, either, in the fact that the patient was not placed in a room with barred windows, since any negligence in that respect was attributable to the employees. On the contrary, the evidence indicated that the hospital routine conformed to standard practices in similar hospitals, with no contrary evidence produced by the plain-

tiff. Although the jury might have disbelieved this evidence, it was not entitled to conclude that the opposite was true. The evidence, therefore, as submitted was insufficient to sustain a finding that the hospital was negligent.

Tocchetti v. Cyril and Julia C. Johnson Memorial Hospital, 36 A. (2) 31 (Conn.) (1944). In this case the death of a baby patient resulted from hot water that leaked from a defective bag. Instruction was given that the hospital was liable only for corporate negligence as distinguished from the personal negligence of a doctor or nurse. Corporate negligence was defined as the negligence of the board of trustees, acting as a board, or of the executive committee, acting as such committee within the scope of its authority. No error was assignable on either score. Nor in the submission to the jury as a question of fact whether the hospital was guilty of administrative negligence in failing to supply and maintain suitable equipment or of negligence in the performance by a nurse of a non-delegable duty of the hospital. There was a question of a defective electric heater supplied for the purpose of giving additional heat when needed, but no evidence was offered to show how long it had been out of order, and the court refused to submit the question of the hospital's negligence in relation thereto, inasmuch as the hospital would be chargable for its defective condition only if it had failed to take steps to have the heater repaired after it knew or should have known of its defective condition.

Cullen v. Schmit, 39 N. E. (2) 146, 139 Ohio St. 194 (1942). The suit was for injuries sustained by one who had fallen down a stairway after a religious service in the defendant's church. The defendant testified, without contradiction, that the sale of religious articles in the church basement to which the stairway led, at the time of the accident, was not a commercial enterprise, but was held in connection with the religious service, and that any difference between the cost and the sale prices of the articles was used for religious purposes. The claim for damages was rejected because it rested on the theory that since the sale was conducted for a profit, the defendant was withdrawn from the protection against liability afforded by the law to charitable institutions. Under this protection they are not liable for tortious injury except when the injured person is not a beneficiary of the institution and when the authorities of the institution have failed to exercise due care in the selection or retention of its employees.

Emrick v. Pennsylvania R. Y.M.C.A. of Crestline, 43 N.E. (2) 733, 69 Ohio App. 353 (1942) . The action was entered by a member of the Y.M.C.A. for injuries caused by the overturning of a radiator in a restaurant on the premises. It was held not to be error to reject evidence tending to prove that the association carried public liability insurance covering the legal liability of the association to persons who might be injured on the premises. The association was held to be a charitable one, as established *prima facie* by its charter and by-laws (which might be contradicted by contrary evidence), and notwithstanding its deriving a profit from certain of its activities. It was therefore not liable to members for the negligent acts of its employees but only for its negligence in the selection of its employees.

Myers v. Young Men's Christian Ass'n of Quincy, 44 N.E. (2) 755, 316 Ill. App. 177 (1942). This was an action resulting from injuries sustained as a result of the collapse of bleachers in a soft ball park. It was held that the corporate charter of the association should have been admitted in support of its allegations that it was a charitable corporation, inasmuch as it is described in its charter as being devoted to the spiritual, intellectual, social and physical welfare of young men, using all its income for that purpose. It does not lose its charitable character from the fact that recipients of its benefits are required to pay when they are able to do so, inasmuch as no profit is made and the amounts received are applied solely to the furtherance of the charter purposes. Hence it was not liable for the injuries caused by its servants and agents in the furtherance of those purposes.

Saffron v. Young Men's Christian Ass'n of Chicago, 45 N.E. (2) 555, 317 Ill. App. 149 (1942). Defendant Y.M.C.A. of Chicago, in view of its charitable character and in view of the fact that in Illinois a charitable institution is not liable for personal injuries caused by the negligence of its servants or agents even though the injured party paid for its services, was not liable for injuries sustained by a guest of defendant's hotel because of the negligent operation of an elevator in which the guest was a passenger.

Schaus v. Morgan, 6 N.W. (2) 212, 241 Wis. 334 (1942). A charitable institution is not liable for the negligence of its servants under the doctrine of *respondeat superior,* even though plaintiff be

a pay patient. The carrying of liability insurance by a charitable institution is immaterial in this respect.

Hammond Post No. 3 Amercan Legion v. Willis, 165 S.W. (2) 78 (Tenn.) (1942). While an action for damages based on negligence of servants may be entered against a charitable corporation, no judgment is recoverable out of property owned in trust for charitable purposes, but a judgment is recoverable when the corporation has funds or property other than those earmarked as trust property or property which is only remotely connected with the purposes of the corporation, or which is only incidentally employed to earn funds for the operation of the trust, for the test as to its property is not whether the corporation administers charity but whether it may be deemed to be acting in the promotion of its charitable design. Thus funds owned by the American Legion and not earmarked by the donor for charitable purposes but derived from the operation of a concession incidental to the Post's charitable purposes were subject to levy and appropriation for tort judgments against the Post.

Anderson v. Armstrong, 171 S.W. (2) 401 (Tenn.) (1943). The protection afforded a charitable organization is not immunity from suit in tort but is rather extended to the trust property itself to save it from execution under a judgment in tort. And a judgment can be pronounced against a charitable organization in an action in tort in spite of the fact that it is not first shown that the organization is presently possessed of property not directly and exclusively used in the operation of the trust, and judgment in this case was therefore not dismissible on that ground. Case involved action against a charitable corporation conducting a school for boys for injuries sustained when one of the horses used by the corporation ran into plaintiff's automobile on a highway.

Southern Methodist University v. Clayton, 176 S.W. (2) 749, reversing *Clayton v. Southern Methodist University,* 172 S.W. (2) 197 (Texas) (1943). Temporary bleachers collapsed and injured a football game patron. The university was not liable for negligence in permitting the bleachers to be crowded beyond its capacity, in failing sufficiently to brace it, and in constructing it of old and defective materials. For the university is a charitable institution inasmuch as it is devoted to public education without private gain, in spite of the fact that it is under the control of a religious denomina-

tion and charges tuition. As a charitable corporation it is liable indeed to an employee for injuries proximately caused by the negligence of its officers, vice-principals or agents, but not to others whether beneficiaries of the charity or strangers to it, provided that the corporation is not negligent in hiring or keeping the agent whose negligence proximately caused the injury. The rule granting this immunity is merely an exception to the rule of *respondeat superior,* itself based upon public policy, and the injured person has a remedy against the actual wrongdoer.

Scott v. Wm. M. Rice Institute, 178 S.W. (2) 156 (Texas) (1943). Here a patron sustained injuries when the heel of her shoe was caught in a crack between the planking of a standing platform adjacent to a seat she was occupying at a football game in the stadium of the corporation. Though corporation managed to make a small profit from its athletic activities which did not pass to its genereal funds, and held a small profit in reserve to be applied against losses in lean years, this fact did not deprive it of its immunity as a charitable corporation, and as such it was immune from liability for the torts of its agents in the absence of negligence in employing or keeping the latter whether the injured party was a beneficiary of the trust or a stranger to it.

Humphreys v. San Francisco Area Council, Boy Scouts of America, 129 P. (2) 118 (Calif.) (1942). Charitable organizations generally have the same liability for the negligence of their employees as exists in the case of other employers.

Canney v. Sisters of Charity of House of Providence, 130 P. (2) 899 (Wash.) (1942). The single fact that injuries were sustained by a paying patient in a charitable hospital is not conclusive on the question of the liability of the latter, since it is not responsible for the negligent acts of an employee unless it failed to exercise ordinary care in the selection or retention of such employee, and the fact that compensation was exacted for services rendered does not, of itself, deprive the institution of its status as a charitable institution. Though it is true that a charitable hospital is liable for injures proximately resulting from its failure to furnish proper equipment, that is, for administrative negligence, nevertheless this rule is subject to the qualification that if the article, which it is the duty of the hospital to supply, is obviously unfit for the use for which it was intended, and a trained nurse in charge of a patient uses it in viola-

tion of the standard of care usual in the nursing practice, the hospital can not be chargeable with any injurious effect following therefrom. Therefore when a special nurse employed by a paying patient places an uncovered hot water bottle to the patient's feet causing burns because of the nurse's failure to have the bottle covered or protected by a blanket, the hospital could not be charged with administrative negligence, and the fact that evidence showed that the special nurse was with the patient from the time of entrance into the hospital room until the burns were discovered was not sufficient to throw the blame on the hospital as if it were administrativly negligent.

Kalinowski v. Young Women's Christian Ass'n, 135 P. (2) 852 (Wash.) (1943). The action here was entered against the association by an adviser of a Girl Reserve Unit for personal injuries sustained when adviser slipped on asociation's floor while leaving the gymnasium during a dance held in it. Inasmuch as the plaintiff was not seeking or receiving any benefit which could be classified as charitable, the charitable character of the asociation was not in issue, and it was subject to the normal rules governing the tort liability of corporations. It was, therefore, not error to submit to the jury the question of whether the adviser was licensee or invitee.

Jankelson v. Sisters of Charity of House of Providence in Territory of Washington, 136 P. (2) 720 (Wash.) (1943). This was an action by a patient who was burned by a rubber electric pad. Though the patient and her husband were not required to prove their case by direct evidence, but could do so by establishing a consistent chain of circumstances from which a legitimate inference could be drawn, the evidence as submitted was insufficient to sustain the jury's conclusion that the injuries were caused by defective thermostats in the pad rather than by other causes for which the hospital could not be held liable because it was a charitable hospital.

Clampett v. Sisters of Charity of House of Providence in Territory of Washington, 136 P. (2) 729 (Wash.) (1943). Cause of action was similar to that in previous case. Question as to whether pad was defective was held to be a question for the jury.

Reviews of Periodicals

Jurisprudence

Series of Three Lectures Delivered before Civil Lawyers in Detroit.

Terence T. Kane, S.J., "Juridical Order Established by God"—*University of Detroit Law Journal,* VII (1944), 25-38.

Chester A. Ropella, S.T.D., Dean of the Theological Department and Professor of Moral Theology and Canon Law at SS. Cyril and Methodius' Seminary, Orchard Lake, "General Norms of Canon Law"—*University of Detroit Law Journal,* VII (1944), 59-72.

S. E. Fedewa, Presiding Judge of the Diocesan Court of Detroit, "Persons and Juridical Personalities in Ecclesiastical Law"—*University of Detroit Law Journal,* VII (1944), 73-86.

Brendan F. Brown, "Legal Aspects of Truth in a World at War"—*Notre Dame Lawyer,* XVIII (1943), 303-316. Need is shown of wisdom of Scholastics for an enduring peace. Two elements are considered as the groundwork for international legal and social justice: 1) the maintenance of the democratic ideal in internal national affairs based on the supernatural dignity of man; 2) fidelity to the natural law in the social organization in conquered nations. The Reformation caused the rejection of the traditional body of fundamental principles regulating international justice and international law became subordinate to the contractualism of international agreements, culminating in the League of Nations and the World Court. This broke down in the face of a realism which denies the existence of a metaphysical order, stresses behaviorism and the economic interpretation of law, and denies ethical values except that of materialistic utility. The net result was the present war. Munich was a victory for realism masquerading as natural law idealism and appealing to the traditional notions of good faith.

Roscoe Pound, "Sociology of Law and Sociological Jurisprudence"—*University of Toronto Law Journal,* V (1943), 1-20. Sociology of law proceeds from sociology towards law, applying biological sociology to the field of law. Sociological jurisprudence is in another line of development, beginning with Holmes and carried out in America in a socio-philosophical direction by Pound and Cardozo. It proceeds from historical and philosophical jurisprudence to the utilization of the social sciences and the participation of sociology in the production of a broader science of law. On the Continent, philosophy has been in the foreground in juristic method; while in American thought, it has been in the background. American sociological jurisprudence arose in connection with the type of American sociology that considers the scientific study of society as dealing with group behavior, with the relationships between men, and with the factors entering into and following from these relationships.

Roscoe Pound, "A Survey of Social Interests"—*Harvard Law Review,* LVII (1943), 1-39. Describes individual, public and social interests. A given claim may have a place in all three categories. It is best to put claims in their most generalized form, i. e., that of social interests, in order to compare them. In common law, conflicting interests of individuals are adjusted under the standard of a social interest, frequently under the name of public policy. Most social interests which law must consider are at least suggested by those recognized as public policy. One exception is the social interest in the general security. This seems rather to be assumed as involved in the very idea of law and as entering into every legal relation as a necessary element. Social interests, however, instead of policies, should be recognized for what they are. A more complete statement and a more adequate classification of them is desirable. As a result of this need, administrative tribunals and administrative methods are born. The social interests that need to be recognized are: the social interest in the general security (in the general safety, in the general health, in peace and public order; and, in an economically developed society, in the security of acquisitions and of transactions, interests that in the nineteenth century seemed to exhaust the entire scope of the legal order); the social interest in the security of social institutions (domestic, religious, political, and economic); the social interest in the general morals, i. e., the claim to be secured against conduct offensive to the moral sentiments of the general body of individuals therein for the time being [*sic*]; the social interest in the conservation of social resources, including natural resources, but including the protection and the training of dependents and delinquents; the social interest in the general progress (economic, political and cultural; the economic, expressed in the common law in four policies: freedom of property from restraint as to sale or use; policy against monopoly; policy as to free industry; policy as to the encouragement of invention); and the social interest in the individual life (individual self-assertion, individual opportunity, and individual conditions of life).

Roscoe Pound, "What Is A Profession? The Rise of the Legal Profession in Antiquity"—*Harvard Law Review,* LVIII (1944), 203-228. Historically three ideas have been involved in the profession: organization, learning, and a spirit of public service. The speechwriter in Greece was the prototype of the advocate. Rome developed the idea of the procurator or the attorney, as well as of the advocate. The latter in Cicero's time was a rhetorician. Patricians gave gratuitous service to their dependents. The function of advisor was performed by the jurisconsults whose great work was accomplished in writing and teaching. Throughout the classic era juristic writing was the principal form in which law appeared. It took the form of commentaries in the Republican era; later, the form of treatises on particular branches.

Roscoe Pound, "The Legal Profession in the Middle Ages"—*Notre Dame Lawyer,* XIX (1944), 229-244. The ecclesiastical courts followed the Roman practice and to them one must look for the earlier history of the modern profession. Litigants could appoint a proctor or the judge could require both a proctor and an advocate. In the English ecclesiastical courts a proctor could not prosecute a case for two court days without the advice of the advocate, who was required to be a doctor of law. German law did not admit repre-

sentation (like primitive law generally) and in France the parties appeared in person as late as 1220, though the example set by the ecclesiastical courts led to the compulsory employment of attorneys in the seventeenth century. Lay lawyers were prominent in civil tribunals by the twelfth century and dominant in the thirteenth. Later the clergy were forbidden to exercise this office in civil tribunals. By the time of Edward I, common law courts existed in England, but representation was exceptional. By the time of Henry VI, however, the profession was formed and organized. It consisted of three categories: judges and sergeants (the latter comparable to doctors of the civil law); apprentices: a) benchers or readers and b) inner barristers or students; and attorneys. When the courts were in session, the students attended at Westminster to take notes. Lectures were given them at the four Inns by senior barristers.

Wiley Blount Rutledge, "Some Premises of Peace"—*Rocky Mountain Law Review,* XVI (1943), 1-12. Article advocates federated system to include defeated nations after a period of probation, system to enjoy instruments of decision and effective sanctions. A treaty is considered ineffective unless people give it wholehearted adherence, especially if the treaty is cast in terms of revenue or imposes mandates or intolerable burdens of reparation or restricts access to materials needed for civilian and peaceful needs.

Clark L. Hull, "Moore and Callahan's 'Law and Learning Theory': A Psychologist's Impression"—*Yale Law Review,* LIII (1944), 330-337. Article admits that the theory was the logical outcome of a wholly natural conception of the law, planned to determine the effects on human behavior of certain legal enactments and related administrative procedures, but insists that their analysis demonstrated that jurisprudence has a legitimate place in a quantitative natural-science conception of the social sciences, in that law is conceived as a special form of human engineering in which the science of human behavior plays the role that physics plays in ordinary engineering.

Hessel E. Yntema, "'Law and Learning Theory' through the Looking Glass of Legal Theory"—*Yale Law Journal,* LIII (1944), 338-347. In the direction of the verification and the refinement of the results of the study, article suggests three issues: 1) what mode of control is most effective— i. e., correspondence of artifact to behavior; 2) in the analysis of behavior in connection with actual or possible litigation, necessary speed in research would seem to require other techniques than the quantitative, even if less exact; 3) is there no room in legal science for the symbolic, inspirational nature of law? is the function of law only to control or is it also to resolve conflicts with least dissatisfaction? is it more important that the rule seem just than that it be observed?

Albert Ehrenzweig, "The American Casebook: Case and Materials"—*Georgetown Law Journal,* XXXII (1944), 224-247. Casebook method of teaching is held not adequate even with added materials; combined with a text book, if a good text book were available, it would be ideal. Information, which is imparted through lectures and text books, and training, accomplished by case analysis, will both always form essential elements of an adequate law course. The survival of the casebook is not due to inherent infallibility but to its adaptability.

William F. Roemer, "Prerequisites of Peace"—*Notre Dame Lawyer,* XIX (1943), 5-12. Discusses five points of our Holy Father's 1939 Christmas message. Notes that Church does not destroy patriotism. Our Holy Father did not propose an ultra-pacific scheme of disarmament to be effective even before other nations disarm. On the other hand, participation in the operation of an International Court of Justice would not destroy right of national independence.

Constitutional Rights

A. J. Levin, "Mr. Justice William Johnson and the Unenviable Dilemma"—*Michigan Law Review,* XLII (1944), 803-830. Article holds that the legal historian, in view of the Supreme Court's judicial restraint caused not by lack of jurisdiction but by bad functioning, should consult the opinions of Mr. Justice Johnson, who attempted thirty years ago to arrive at a functional interpretation of judicial power. He felt as Holmes that the judiciary was not given authority to solve all antinomies of individual and social conflict, but was restricted to actual cases and controversies. He maintained, however, that law must be technically, though not mathematically, precise, if courts are not to rule by interpretation. The legislature, it is noted by the article, is limited by the constitution and is not omnipotent, as Johnson is said seemingly to imply. Moreover, judges are not prepared to assume the functions performed by technical administrative agencies and departments. Persons trained in law only should not be the final judges on the vital subjects of human behavior. On the other hand the intervention of technological specialists in this role requires that the latter be equipped by training in mental functioning.

Walter B. Kennedy, "Portrait of the New Supreme Court"—*Fordham Law Review,* VIII (1944), 1-16. Analyzes departure from the principle *stare decisis* in *Mercord Corporation v. Mid-Continental Investment Company* (64 Sup. Ct. 268) and in *Mahnich v. Southern Steamship Company* (64 Sup. Ct. 455). Action is traced to underlying causes falling into two categories: 1) devotion to the juristic philosophy of Holmes, marked by his skepticism, cynicism as to eternal values, dismissal of the natural law, and abhorrence of principles; 2) acceptance of the pragmatism of James and Dewey exerting its influence as the philosophy of America generally.

Harold Pressley Jr., "Expanding Civil Liberties in the Supreme Court"—*Texas Law Review,* XXII (1944), 230-235. Considers *Murdock v. Pennsylvania* (319 U.S. 105), *Martin v. City of Struthers* (319 U.S. 141) (both refusing to sustain local ordinances contravening the activities of Jehovah's Witnesses), and the *Gobitis* reversal (310 U.S. 586) (affirming injunction against enforcement of flag-salute under penalty of expulsion from school).

James A. Doyle, "Free Speech and Fair Trials"—*Nebraska Law Review,* XXII (1943), 1-6. Studies the "clear and present danger" test as opposed to the "reasonable tendency" test for the publication of matter contemptuous of court during trial and uses for its study the cases of *Bridges v. California* and *Times-Mirror Co. v. Superior Court.* States that the upholding of the decision in the former does not give constitutional sanction to trials by newspapers, though the liberty of expression is to be protected by what is believed to be a stricter standard.

Louis L. Jaffe, "In Defense of the Supreme Court's Picketing Doctrine"—*Michigan Law Review,* XLI (1943), 1037-1059. Discusses among other cases *Thornhill v. Alabama* (310 U.S. 88) and says that labor was there being recognized as a national force and picketing was being brought within the Fourteenth Amendment as an exercise of freedom of speech. Studies also *Milk Wagon Drivers Union, Local No. 753, v. Meadowmoor Dairies* (312 U.S. 287); *American Federation of Labor v. Swing* (312 U.S. 321), and *Bakery & Pastry Drivers & Helpers, Local 802, v. Wohl* (315 U.S. 769). In the first terrorists were forbidden to use crimes as promotion assets and in the latter two, a broad meaning was given to the words, "primary employer", that is, as indicating the employer against whom picketing is held contsitutional.

Norman L. Stamps, "Freedom of Assembly"—*University of Kansas Law Review,* XI (1943), 187-202. Notes two tests forbidding assembly: "clear and present danger" and "bad tendency" and observes that police powers to regulate traffic, to abate nuisances and to prevent breach of peace have prevailed.

John Raeburn Green, "Liberty under the Fourteenth Amendment, 1942-1943"—*Washington University Law Quarterly,* XXVIII (1943). 251-271. Discusses *Valentine v. Chrestensen* (316 U.S. 52) (unanimously holding that the distribution of advertising matter on the streets was not communication of information or the dissemination of opinion as protected by the Constitution); *Taylor v. Mississippi* (63 S. Ct. 1200) (declares as an infringement on freedom of speech and press a Mississippi statute which prohibited the distribution of literature designed to create disloyalty or a stubborn refusal to salute the flag); *Largent v. Texas* (63 S. Ct. 667) (unanimously reversing the conviction of a Jehovah's Witness under an ordinance requiring a permit at the mayor's discretion for the sale of books); *Jamison v. Texas* (63 S. Ct. 669) (unanimously holding that ordinance forbidding the distribution of handbills in restraint of Jehovah's Witnesses was an infringement of the freedom of the press and of religion); *Jones v. Opelelka* (316 U.S. 584) (referring to the sustaining in 1941 by a five-four vote and the vacation in 1942 of three municipal ordinances imposing a flat license fee and providing discretionary power to revoke the license); *Murdock v. Pennsylvania* (63 S. Ct. 870) (in which eight new cases were merged involving convictions of Jehovah's Witnesses who had been convicted of selling religious literature in violation of ordinances); *Douglas v. Jeannette* (63 S. Ct. 877), decided at the same time as the previous cases; *Martin v. Struthers* (63 S. Ct. 862) (overruling ordinance forbidding the summoning of a householder); *Minersville School District v. Gobitis* (310 U.S. 586) (upholding the statute requiring the flag salute by an eight-one decision); and reversal of latter opinion by a six-three affirmation of the West Virginia decision in *Barnette v. State Board of Education* (47 F. Supp. 251—West Virginia decision; 63 S. Ct. 1178). In the reversal on the question of the flag salute, article notes that Justice Murphy concurred in a special opinion as to the freedom of silence, which was the basis of Justice Jackson's opinion, written for the majority of six. [Cf. THE JURIST, I (1941), 32-39; III (1943), 503-505].

Chronicle

GENERAL

During July and August our Holy Father granted private audiences to the following distinguished personages: Myron Taylor, the President's Representative at the Vatican; Winston Churchill, Prime Minister of Great Britain; Clement R. Atlee, Vice Prime Minister of Great Britain; Henry L. Stimson, Secretary of War of the United States; General Charles de Gaulle; Minister Guerin, representative of the Provisional Government, National Committee of French liberation; Ivanoe Bonomi, President of the Italian Council of Government; Lord Gort, former Governor of Malta, British Commissioner of Palestine and Transjordania; Brigadier General Thoburn K. Brown, new Commander of the Rome Area Command; and Robert D. Murphy, former Ambassador to Algiers.

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The State Department of the United States has appointed Franklin C. Gowan to a post with the United States diplomatic staff at the Vatican.

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Afer an 18-year interruption of diplomatic relations with the Holy See, the Netherlands government has named Jonkheer M. W. van Weeke as Extraordinary Representative and Minister Plenipotentiary to the Holy See.

* * * * *

In late August, Leon Berard, French Ambassador to the Holy See, informed the Papal Secretariat of State that inasmuch as Marshal Petain was unable to exercise the powers entrusted to him by the National Assembly, the envoy considered his mission at the Holy See at an end.

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Col. Charles Poletti, Commissioner of Region Four of the Allied Military Government in Italy, embracing the City of Rome, has paid a high tribute to the cooperation he has received from the Holy See, particularly in the handling of refugees and refugee camps, and noted that the Vatican has borne the heavy burden of operating soup kitchens serving 300,000 meals daily. This work is aided by the Italian utilities company known as *Immobiliare,* which suspended operation during the Nazi occupation and dedicated its resources to the aid of the Vatican.

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In late August a Superior Commission for the Co-ordination of Help to War Refugees was formed, on which the President of the Pontifical Commission for Help to Refugees and the Italian Commissioner for Assistance to Refugees will be members.

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On July 24 our Holy Father received members of the *Circolo San Pietro,* a charitable society founded by the Vatican in 1869, and exhorted them to

remain faithful to the Church, deploring the fact that certain members of the Church, calling themselves Catholics, believe that they can reconcile the doctrine of the Church with concepts that are the antithesis of Christianity.

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Rt. Rev. Monsignor Walter S. Carroll, of the Diocese of Pittsburgh, and attache of the Papal Secretariat of State, has been appointed to head a special commission to deal with Allied military authorities on economic, political and religious questions.

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Rev. Martin T. Gilligan, of the Archdiocese of Cincinnati, has been appointed to the Vatican Information Service Office in Algiers as assistant to Rt. Rev. Msgr. Walter S. Carroll, of the Diocese of Pittsburgh.

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War Relief Services—National Catholic Welfare Conference has announced that in cooperation with De Paul University and the Swiss Catholic Mission, correspondence courses carrying university credits will be made available to prisoners in camps in Europe who request them through the offices of War Relief Services.

War Relief Services has assisted in establishing 134 welfare centers for 60,000 civilian refugees and members of the Polish Military in Palestine, Iran, Egypt, Tananyoila, Kenya, Northern and Southern Rhodesia, Great Britain, Italy, and the Middle East, according to the report of Rev. Aloysius J. Wycislo, of the Archdiocese of Chicago, field supervisor for War Relief Services.

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In mid-August, the Knights of Columbus held their 62nd annual convention in Toronto, adopting a program prepared by its War Activities Committee to provide a college education for the sons and daughters of its members who may lose their lives in the war or die within ten years after the war or who may be totally disabled as a result of military service.

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In late August the Catholic Central Verein of America and its auxiliary, The National Catholic Women's Union, held their 89th annual convention at St. Paul, at the opening of which a Pontifical Mass was celebrated in the Cathedral of St. Paul by Most Rev. Joseph F. Busch, D.D., Bishop of St. Cloud. The convention was addressed by Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo and member of the Bishops' Committee on the Pope's Peace Points, in which he advocated a Confederation of Nations, preserving individual sovereignty, as essential to a lasting peace.

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On September 9, the second annual "Red Mass", opening the September term of court, was celebrated in the Cathedral of the Immaculate Conception, Kansas City, Missouri, in the presence of Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, by Very Rev. F. E. Hagedorn, J.C.D., Chancellor. The sermon was preached by Most Rev. Paul C. Schulte, D.D., Bishop of Leavenworth.

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On September 11 a "Red Mass" was celebrated in Notre Dame Church, Montreal, marking the formal opening of the courts.

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August 7-9, the 73rd annual convention of the Catholic Total Abstinence Union was held in Atlantic City.

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Catholic Action in San Salvador has protested against the "anti-democratic limitation" which bars priests from election to the Constituent Assembly.

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The promulgation of the Code of Canon Law for the Oriental Rites has been announced as likely to be made early in 1945.

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George Drew, Premier of Ontario and Minister of Education of the Province, announces that a course in religious education will be inaugurated in the lower grades of the non-sectarian schools (as distinct from the "separate" or Catholic schools) when they reopen in September. Two half-hour weekly periods will be allocated to the work and the instruction will be given by the teacher unless the school board by a formal resolution designates a clergyman.

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On August 22, His Eminence Luigi Cardinal Maglione, Papal Secretary of State, died at Casoria, near Naples, following a heart attack, at the age of 67. Cardinal Maglione was ordained at Rome in 1901, consecrated Bishop in 1920, made Cardinal in 1935 and Papal Secretary of State in 1939. He represented the Holy See in Switzerland immediately after the first World War, and was appointed Apostolic Nuncio to France in 1926. He was buried at Casoria on August 24.

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Most Rev. Edward J. Hanna, former Archbishop of San Francisco, was buried after a Solemn Pontifical Mass of Requiem celebrated in the Church of Santa Susanna, Rome, on July 13, by Most Rev. Paolo Giobbe, Papal Nuncio to the Netherlands. His death occurred on July 10. He was 84 years old. He had been Chairman of the Administrative Board of the National Catholic Welfare Conference since its founding in 1919 until 1935.

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On August 1, Manuel Quezon, President of the Philippine Commonwealth since 1935, died at Saranac Lake, N. Y., of tuberculosis.

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Dr. Frederick Kinsman, Catholic lecturer and author, died at Lewiston, Maine, in early July at the age of 72.

DIGNITIES

Most Rev. Henry P. Rohlman, D.D., formerly Bishop of Davenport, was installed as Coadjutor Bishop of Dubuque on September 12 in St. Raphael's Cathedral.

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His Eminence James Cardinal Copello, Archbishop of Buenos Aires and Primate of Argentina, has been appointed by our Holy Father as Legate to the National Eucharistic Congress to be held in Buenos Aires in October.

Monsignor Alfredo Olivar Aranda, of the Diocese of Lipa in the Philippine Islands, has been nominated Auxiliary Bishop to Most Rev. Alfredo Verzosa, Bishop of Lipa.

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Most Rev. Leon Terrier, Bishop of Tarantaise, France, has been transferred to the Diocese of Bayonne.

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Rev. Bernardo Botero-Alvarez, Rector of the Diocesan Seminary at Tunja, Colombia, has been nominated Bishop of Santa Marta.

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Most Rev. Ernesto Seno de Oliveira, previously Auxiliary to the Patriarch of Lisbon, has been transferred to the See of Lemage, Portugal, and Rev. Joseph Newton Dealmeida Batista, Canon of the Metropolitan Chapter of St. Sebastian in Rio de Janeiro has been nominated Bishop of Uruguayana, Brazil.

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Most Rev. Benjamin de Arriba Castro, Bishop of Mondonedo, Spain, has been made Bishop of Oviedo; Monsignor Francesco Blanco y Najera, Vicar General of the Diocese of Cordova, has been nominated Bishop of Orense; and Monsignor Jose Varcia Golagaz, Archpriest of the Cathedral Chapter in Madrid, Bishop of Orihuela.

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Monsignor Dominic Senyemon Fukahori, who made his theological and canonical studies at the Sulpician Seminary in Montreal, has been named Bishop of Kukoka, Japan. Monsignor Francis Hong Takeoka has been named Vicar Apostolic of Heijo in Korea.

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Rev. Bernard Stein has been nominated Auxiliary Bishop of Trier.

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Most Rev. Victor Foley, S.M., has been consecrated Vicar Apostolic of Fiji.

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Msgr. James M. McDonough has been appointed Vicar General of the Diocese of Cleveland, and is succeeded in the rectorship of St. Mary's Cleveland Diocesan Seminary by Rev. John F. Dearden.

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Rev. Frederick G. Hochwalt, Assistant Superintendent of Schools of the Archdiocese of Cincinnati, has been appointed Director of the Department of Education of the National Catholic Welfare Conference and Acting General Secretary of the National Catholic Educational Association.

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On August 31, Mrs. Robert A. Angelo, of York, Pa., President of the National Council of Catholic Women, received from the hands of Most Rev. George L. Leech, D.D., J.C.D., Bishop of Harrisburg, the Papal Medal "Pro Ecclesia".

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J. Edgar Hoover, Director of the Federal Bureau of Investigation, delivered the 1944 Commencement Address at Holy Cross College and received the degree of Doctor of Laws from that institution.

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